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Vol. VI

TRANSCRIPT OF RECORD

(Pages 2545 to 2810)

Supreme Court of the United States

OCTOBER TERM, 1947

No. 79

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, ET AL.

No. 80

LOEW'S, INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 81

PARAMOUNT PICTURES, INC., AND PARAMOUNT FILM DISTRIBUTING CORPORATION, APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 82

COLUMBIA PICTURES CORPORATION AND COLUMBIA PICTURES OF LOUISIANA, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 83

UNITED ARTISTS CORPORATION, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MAY 8, 1947.

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vs.

THE UNITED STATES OF AMERICA

No. 84

UNIVERSAL PICTURES COMPANY, INC. (SUED HEREIN AS UNIVERSAL CORPORATION AND UNIVERSAL PICTURES COMPANY, INC.), UNIVERSAL FILM EXCHANGES, INC., AND BIG U. FILM EXCHANGE, INC., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCT. 8, 1947.

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No. 85

AMERICAN THEATRES ASSOCIATION, INC., SOUTHERN CALIFORNIA THEATRE OWNERS ASSOCIATION, JOSEPH MORITZ, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

No. 86

W. C. ALLRED, CHARLES E. BEACH AND ELIZABETH L. BEACH, PARTNERS TRADING AS BEACH AND BEACH, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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VOLUME VI

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United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Petitioner,

vs.

PARAMOUNT PICTURES, INC., *et al.*,
Defendants.

Equity
No. 87-273.

Before:

HON. AUGUSTUS N. HAND, C.J.,
HON. HENRY W. GODDARD, D.J., and
HON. JOHN BRIGHT, D.J.,

New York, January 15, 1946;
10:30 o'clock a. m.

(Met pursuant to adjournment.)

Judge Hand: Now, have you arranged among yourselves for any order of argument or any scheme at all?

Mr. Wright: I discussed the matter over the telephone with Mr. Caskey yesterday, if the Court please. I told him that our main argument would consume, I thought, less than two hours, and we would then, of course, finish up this morning; and I understood from him the defendants would probably want this afternoon and tomorrow morning, and then we could finish up tomorrow afternoon.

Judge Hand: That is all right. We shall adjourn today at a quarter past four. I have an engagement at half-past four that I should get to

ARGUMENT ON BEHALF OF GOVERNMENT.

Mr. Wright: If the Court please, in making this argument we shall assume that the Court has read our brief, the two joint briefs filed by the producer-exhibitor defendants, and the briefs separately filed on behalf of Columbia and on behalf of United Artists and Universal. These briefs, we believe, define the basic issues with which the Court is confronted, and we shall address ourselves to those issues. The five supplemental briefs filed by each of the producer-exhibitors merely elaborate the arguments contained in joint briefs, and while they point up certain invidious distinctions between the various producer-exhibitors, we do not read any of them as claiming that any differences in their business conduct or power are so great that the dissolution relief sought by the plaintiff might properly be denied as to one while granted as to another.

Judge Hand: Assuming that there were no defendants but one, do you claim that any of them monopolize or restrain commerce as between themselves and their own subsidiaries?

Mr. Wright: Oh yes, we do.

Judge Hand: So you could leave out, according to your contention, all of the great, universal alleged conspiracy and still have a case you think?

Mr. Wright: That is right, your Honor.

Judge Hand: Based on their system and not on just incidents, particular incidents?

Mr. Wright: That is right. Of course, they have to be viewed against the context of the industry in which they are engaged and the industry practices.

Our main argument will be divided between Mr. Marcus and myself, with Mr. Marcus devoting his attention principally to the aspects of the case which affect all eight defendants as distributors. My argument will be confined, insofar as practicable, to the relief sought against the five producer-exhibitor combinations, as such.

Mr. Wright on behalf of Government

I think it is reasonbly clear from their briefs that the producer-exhibitors' defense to this suit rests principally on a claim that their trade practices must be viewed as isolated transactions wholly unrelated to the kind of business organizations that employ them. A further assumption on which their defense rests is that if a particular business practice or method of organization has been habitually and generally employed in a particular trade, it cannot violate the Sherman Act, even though this normal structure and practice are such as to restrict arbit arily the competitive opportunities in the trade in question.

Now, the plaintiff's case, admittedly, rests on the rejection by the Court of both of these fundamental assumptions on which the defendants argument is based. We make no claim that we can prevail in this case unless the Court makes an objective examination of the economic structure of this industry and the competitive practices which prevail in it, and the basic assumptions on which it operates, free from any——

Judge Hand: Now there perhaps I misunderstand you. I thought that you did. I thought you just have in answer to my question.

Mr. Wright: No, I think not.

Judge Hand: I thought you said if there was—well, we will take the Fox films in the California situation and other situations, that they and their subsidiaries violated the Sherman Act if there was not another defendant on the scene.

Mr. Wright: That is right, but our contentions as to dissolution do attack the basic assumptions on which Fox considered alone operates its business. That is if you adopt a preconception that merely because the Fox organization alone has assumed a status as a respected institution the Government may not challenge its validity under the Act, then of course we can't prevail.

I merely point out in viewing any segment of this industry this suit raises basic questions which require a fresh

objective examination of what is being done in the business free from any notion that merely because it is established it is legal.

Now this proceeding was deliberately designed to bring into question these basic assumptions on which the industry operates in its economic structure and trade practices. It was not brought to ascertain the extent of such economic hardships as the system may from time to time inflict upon any particular members of the industry, nor was it primarily directed to competitive effects prohibited by the Act in any particular local area. The Government has deliberately confined its evidence to the more general aspects of the structure and practice of the defendants in order to demonstrate the fundamental incompatibility of that structure and practice with free competition as such. We freely concede that if the defendants are right in their theory that the Sherman Act protects only complaining witnesses and not the interest of the general public in the maintenance of a free enterprise system as such then this proceeding has no merit.

We also concede that in evaluating the structure of these defendant combinations and their established trade practice, the Court is not bound to accept any notions of the prosecuting officers as to what kind of an industry structure seems to them to be desirable. In fact, the Court is bound to reject all such notions advanced by anyone except in so far as they are found compatible with maintenance of the kind of competitive opportunities which the Supreme Court has said the Sherman Act protects. We do not ask this Court to replace the existing consent decree with an effective decree on any other basis than a finding that the consent decree is inadequate to enforce the Sherman Act against the defendants. Such a finding must, of course, be based upon an application of what the Supreme Court has held in interpreting the Act to the proven industry facts rather than the past or present opinions of the parties as expressed by their counsel.

Now as a corollary of this proposition, the fact that a particular monopolistic or competition-suppressing practice

represents an exercise of sound business judgment on the part of persons enjoying its benefits, must equally be without weight in determining whether or not the Act has been violated.

If absence of sound business judgment were a condition of law violation there could be no effective enforcement of this Act, which, by its nature, places restraints upon the pursuit of business self-interest to its logical limits.

We make these concessions, not from any altruistic motive, but in the firm knowledge that the decisions of the Supreme Court make it impossible for this Court to accept these postulates on which the defendants rely.

The courts have repeatedly emphasized the necessity for viewing the activity of the dominant elements of an industry as a whole in any antitrust case brought against them by the Government. The courts have also repeatedly held that even when a restraint of trade has become sufficiently established and generally profitable to become acceptable to most or all of the members of an industry immediately involved in the restraint, that fact cannot save it from the condemnation of the law. The Pullman Company enjoyed an unchallenged monopoly of the business of furnishing sleeping car service for fifty years, but that did not prevent the divorcement of this business from Pullman's car manufacturing business when it was found that such integration unreasonably restrained trade in the purchase of sleeping car equipment. The Aluminum Company of America enjoyed a virtually complete monopoly of the production of alumina and partial monopolization of the aluminum fabricating business for almost as long a period and was only saved from a decree ordering its dissolution as a means of establishing competition by the existence of a statute more specific than the Sherman Act, designed to accomplish the same purpose. In that case, as here, there had been a prior consent decree which the defendants attempted to use as an immunity cloak for continuing monopolization, but the effort met with no success.

In their reliance upon the consent decree in this case to defeat relief here, the defendants have succinctly stated their basic opposition to the enforcement of the antitrust laws, as such. At pages 2 and 3 of their joint brief regarding the consent decree, the defendants state:

> "In the negotiation of the decree it early became apparent to all parties that, in addition to the subjects referred to above"—those subjects were blind selling and block booking—"there were certain recognized trade practices within the industry which in practical application had given rise to a number of complaints and criticisms on the part of some so-called independent exhibitors. It was also recognized that the considerations and factors involved in these trade practices (such as clearance and run, for example) were of a business nature and that decisions with respect thereto primarily involved the exercise of business judgment. It was concluded by both the Government and the defendants that an adequate and fair solution of many of these problems could not be achieved by resort to proceedings under the antitrust law. Many elements quite different from violations of law, were involved. It was considered essential that some procedure, expeditious in nature and designed to provide something of a layman's review of business judgment was the most desirable procedure for resolving these controversies."

The suggestion that the Government, in entering into the consent decree agreed with the defendants that the solution of unfair trade practice problems within the industry "could not be achieved by resort to proceedings under the antitrust law," is simply a claim that the Government and the Court, by entering that decree, were setting up a plan of industry regulation which neither had the slightest authority to sanction. The only jurisdiction this Court has now or ever had in this case was to enforce the antitrust

laws against the defendants or to dismiss them from the suit. The filing of the complaint in this suit had no other purpose than such enforcement; the members of the Attorney General's staff who represented the Government in negotiating that decree were employed for no other purpose; and the Court, in entering that decree, was engaged in no other purpose than the enforcement of the antitrust law.

Judge Hand: That is all very true, in one sense, but it is not very profitable, you know, to lead the Court and the industry like infants crying in the night, and nothing but a cry; or, as Sill said in his poem, "A lot of people dancing in infuriosio, nothing but cares around."

You ought to have some kind of a system, I should think, that you advocate and could point to, if you object to this.

Mr. Wright: I think we do. We advocate a free competitive system instead of this rigidly controlled one.

Judge Hand: You mean a system where they rent a picture to one theatre just that one time, with nothing else?

Mr. Wright: We advocate, fundamentally, a system where a distributor is free to function as a distributor without any agreement or affiliation binding him to some exhibitor for the purpose of eliminating competition between exhibitors.

The defendants' claim that restraint of trade in this industry may not be corrected by resort to proceedings under the antitrust law is simply another way of phrasing its basic claim that the industry practices in which the defendants engage are outside the reach of the antitrust laws because they have been widely accepted and continuously employed for many years. This Court is not organized to perform and this proceeding was not brought to provide "a layman's review" of the business judgment of the defendants. Their business judgment, insofar as it is reflected in the profitability of their business, may be unimpeachable. The question that this Court has to resolve is whether or not what was done by them unreasonably restrained trade in motion pictures.

While a concept of unreasonableness, related to the public interest in the preservation of competition, rather than the pursuit of successful business policy is one which is apparently foreign to these defendants, this concept has become firmly imbedded in the most recent decisions of the Supreme Court. These decisions show that Court's profound concern for the protection of this interest, regardless of whether anyone gets on the witness stand and complains that suppression of competition hurt him and regardless of whether the suppression has become thoroughly institutionalized.

In the Interstate Circuit case the business judgment of the defendants in imposing the restrictions which the Court found illegal was clearly vindicated by the fact that their overall revenue from the exhibition areas in question was increased as the result of the imposition of the illegal restrictions. That is to say, the increase in rentals received from Interstate more than offset the decrease in rentals from independents, yet the soundness of the business judgment which led to the imposition of these restrains could not save them from the Court's condemnation. In the Ethyl Gasoline case no witness took the stand to complain about any practice. The case was heard on stipulated facts. There was no attempt to show that the prices which the Ethyl Gasoline Corporation sought to maintain for its product by the licensing system there brought in question were reasonable or unreasonable, nor was there any attempt to show that any particular member of the public or the gasoline industry had been directly injured by the system. In fact, the defendants offered proof that the whole purpose of the system was to protect the public from injury by providing for safe handling of a potentially dangerous product. Yet the Court was unimpressed by those claims and insisted that that system was illegal per se because it arbitrarily stabilized prices, and the public was conclusively presumed to have an interest in a free market for any product which moves in interstate commerce, and which the Sherman Act protects.

In the Masonite case no one complained that he was hurt by the practices there brought into question. The defend-

ants offered affirmative proof to the effect that the prices charged for hardboard were reasonable and that the public benefited from this system of distribution that they had devised whereby one manufacturer made all the board and the others distributed it on an agency basis at prices fixed by Masonite. Again the complete rationality of this system was assumed from the standpoint of the exercise of sound business judgment by the defendants, but the scheme was held to be illegal because it suppressed price competition as such.

Now, in Mercoid v. Midcontinent Corporation, a long established patent licensing practice was overthrown. A combination patent was held not infringed by the knowing manufacture and sale of competing products for use as part of the patented combination. Now, although such activity had long been established as contributory infringement, the Court simply held that an extension of monopoly rights granted by the patent laws in any manner whatsoever violated the public purposes of the patent laws and the Sherman Act.

Now, in United States v. Crescent Amusement Co., the District Court, in refusing the Government's request to incorporate in its decree a provision compelling the defendants to secure Court approval before acquiring theatres, held that it was sufficient merely to prohibit future acquisitions which were preceded by predatory practices.

Now, when the Government argued that there might be a complete destruction of competition by a voluntary sale without any predatory practices when the only competing theatre in a particular town was acquired, the District Court replied that such a limitation would tend to deprive independent theatre operators of a market for their theatres. The plaintiff argued successfully in the Supreme Court that the effect of an acquisition on competition must be the test, regardless of whether or not the application of that rule tended to restrict the sales opportunities of particular independent exhibitors. The Supreme Court accepted the plaintiff's argument and directed the District Court to incorporate a provision in its decree which would prevent the de-

fendants from acquiring theatres in any town unless they first satisfied the court that it would not restrain unreasonably competition in theatre operations, and those defendants operated in towns with less than 2500 people.

Now, in going to the unusual length it did in reversing the District Court on a matter which would ordinarily have been within its discretion, the Supreme Court demonstrated a concern for the preservation of motion picture theatre operating competition, per se, which completely refutes the defendants' assertion that the sole basis for the Court's decision in that case was the history of predatory practices in which the defendants had engaged. We submit that anyone who will read together the opinions in these five consecutive cases just mentioned, commencing with Interstate Circuit and concluding with Crescent Amusement, cannot escape the conclusion that the Supreme Court has steadily moved in a direction which these defendants have simply ignored in their argument. While the Crescent case alone commits the Court to the specific proposition that full opportunity for theatre operating competition in licensing films is required by the Sherman Act, the general trend of the Court's thinking, exhibited by these five cases, shows that regardless of how firmly established are the practices indulged in by any business organization, or how desirable they may seem from the standpoint of business efficiency, if they endanger the existence of a competitive market, as such, they must be terminated.

Now, the only court besides this one which has had occasion to consider the competitive effects of the defendants' integrated structure, as a structure, found that this structure had in fact unreasonably restrained competition in and of itself. This decision, rendered by a three-judge court in Paramount v. Langer (23 F. Supp. 890), upheld the North Dakota theatre divorcement law, and although appealed by the defendants, was not reviewed on the merits by the Supreme Court because the statute was repealed before the case could be heard.

Now, let us examine the precise nature of the competition that the defendants claim exists in the motion picture theatre market. It is expressly conceded that there is no competition among them as theatre operators for the films of the distributors which own theatres, in the locations where those distributors have affiliated theatre interests. The extent of their claims as to competition among affiliated theatres is simply the claim that they are in competition with each other for the public's dollar in the small number of situations where two or more serve the same competitive area.

Now, there is no testimony in this entire record to the effect that there have been at any time any competitive negotiations between two or more affiliated theatres for the film product of any distributor defendant. The plaintiff's evidence shows that for the last ten years, in the principal cities of the country, there has been no shift in the first run outlets for the defendants' films as between affiliated theatres, except as a result of termination of product or theatre pooling agreements. There is evidence that on occasion some of the distributor defendants have broken with affiliated circuit outlets at various times, but there is no evidence that any distributor defendant did so because it received a better offer from one defendant's theatres than from the theatres of another defendant. No affiliated theatre operator testified, by affidavit or otherwise, that he has ever even made an offer to license films being exhibited by another affiliated theatre, and in view of the elaborate testimony of the defendants' executives received by the Court without restrictions of any kind, the fact that no such testimony was tendered is clear evidence that no such offers have been made.

Now, there is no express concession as to lack of competition in licensing films by the affiliated theatres generally, by their counsel, but the record is perfectly clear that there was no more competition among them in licensing films generally than there was with respect to the situations where their affiliated theatres used their own films. Now, this

absence of film licensing competition among the producer-exhibitors is not fortuitous. It is amply illustrated by documents in evidence which demonstrate a specific intent on the part of all of them not to compete with each other.

Now, let us look first at the theatre operating agreements in evidence relating to San Francisco, California——

Judge Goddard: Mr. Wright, what would you do, auction off pictures? What is your solution?

Mr. Wright: You mean as to how pictures should be sold?

Judge Goddard: Yes.

Mr. Wright: I see no reason why they should not be sold competitively.

Judge Bright: What do you mean by that?

Mr. Wright: Well, putting pictures on the auction block does not appeal to me as anything which is inconsistent with the purposes of the Sherman Act. I do not see why they should not go on the auction block.

Judge Goddard: What is your solution? What do you say? What is your solution?

Mr. Wright: Well, our solution primarily is the dissolution of these combinations which we say, as such, prevent competitive distribution and exhibition of films.

Judge Goddard: Assuming that that is done, then how does a distributor go about to sell his picture?

Mr. Wright: We think a distributor should go about selling his picture by deciding where he wants it shown and how many runs, what the sequence shall be, and so forth, without making any agreement with one group of exhibitors against another giving certain theatres a fixed quasi permanent preferred status in a system of exhibition or distribution. Let him use his own judgment in making his film contracts free from these restrictions.

Judge Goddard: Isn't that what the distributor is doing now? Getting as much as he can?

Mr. Wright: He is getting as much as he can, but he is doing it by a process which involves the making of agreements which plainly restrict competition between theatre operators. That is a privilege that we don't think he has. Mr. Marcus in his argument will undertake to develop more fully the case against the distributors as such.

However, if I may, I would like to proceed with my discussion of this question of theatre operating competition if I may.

Now, as I say, calling attention to San Francisco, California, that is a case where Fox alone with five producer-exhibitors is engaged in operating theatres, although Paramount and Loew also own theatres in that town.

Now the first agreement——

Mr. Caskey: Mr. Wright, RKO operates a theatre in San Francisco.

Mr. Wright: Mr. Caskey calls my attention to the fact that RKO has one theatre there, and I believe that is correct. But at any event Fox operates first-run theatres there. Paramount and Loew also own theatres there which are operated by Fox and I propose to discuss the agreements which have brought that situation about.

Now the first agreement in point of time is Exhibit 232-A, dated December 10, 1930, which was when Paramount first leased its first-run theatres in San Francisco, Portland, and Seattle to Fox for periods varying from three to twenty years.

Now that contract was made between Paramount-Publix Corporation, the principal Paramount theatre-operating corporation, and Fox Film Corporation, distributor of Fox films, which controlled Fox West Coast Theatres, Inc., exhibiting corporation which was to operate the theatres in question. The agreement expressly assumed that the latter all of the first-run theatres in these towns in which Fox had any financial interest whatsoever whether in the form of a minority stock ownership or just a participating agreement. It provided that Paramount should receive as additional rent a share of Fox's earnings from first-run exhibition of all distributors' films in all such first-run theatres if those

earnings exceeded a stipulated amount. Fox is also given the exclusive right to show Paramount films first-run in these towns and an option to license them for second run. The agreement further expressly provided that if control of Fox West Coast Theatres, Inc. passed out of the hands of Fox Film Corporation, Paramount could terminate the agreement on six months' notice. The present disclaimer of a vital interest in the affiliation of those theatres with which they do business had apparently not occurred to these defendants in 1930.

The next agreements involving the San Francisco situation are both dated January, 1934, and were made between the Paramount trustees in bankruptcy and Fox West Coast and Fox Film and are in evidence as Exhibits 232 and 233. The latter consists of three leases for the same three Paramount theatres in San Francisco covered by the 1930 agreement, for ten-year terms, all expiring in 1943, and they are expressly conditioned on the continuance of a Paramount ten-year film franchise for the same theatres dated August 1, 1933.

These leases were executed pursuant to Exhibit 232, under which the trustees made an agreement with Fox covering the San Francisco, Seattle and Portland theatres included in the 1930 agreement and adding to the Fox San Francisco first-run pool Loew's Warfield Theatre.

Now this over all agreement did not result merely from problems arising in bankruptcy, but expressly states that it is a composition of disputes arising under the 1930 agreement and its terms are in effect an extension of that agreement through 1943. It gives Paramount 37½ per cent of the operating profits of all of the first-run theatres in San Francisco operated by Fox, including the one owned by Loew and leased to Fox, and provides for parallel franchises for the use of Paramount films in Fox theatres in Oakland and Portland, as well as in San Francisco.

Now by Exhibit 222, dated November 5, 1943, an agreement made between Paramount Pictures, Inc., and Fox West

Coast Theatres, this pooling arrangement as to San Francisco has been extended for another ten years, through 1953.

Now then, Exhibit 231 is a lease of the Loew's Warfield Theatre to Fox executed by Metro Goldwyn Mayer Distributing Corporation, which is also in evidence, and that is dated August 1, 1936, and covers a ten-year period, and is also expressly conditioned upon continuation of a film franchise simultaneously executed for the exhibition of the Loew films in the Fox first-run houses in San Francisco.

Now there are also in evidence franchise and lease agreements executed by Loew and Fox with reference to Los Angeles at the same time whereby a theatre there was leased to Fox and the Loew pictures were committed to the Fox Theatres.

Now in the face of those written agreements, how can anyone argue that Fox, Loew and Paramount have exhibited no intention of restricting competition among themselves, and that their film licenses with each other have not been conditioned upon theatre affiliation?

Now the written agreements by which RKO and Warner have prevented and still prevent theatre operating competition between the theatres owned by them in Albany, New York, are in evidence as Exhibits 204 and 229. 204 is an agreement between RKO Proctor Corporation and Fast Theatres, Inc., by S. H. Fabian, president, which provides for lease to and operation by Fast of two RKO theatres in Albany, two located at Schenectady, and one at Troy. The agreement is dated January 1, 1935, and extends for 21 years, expiring in 1956. In addition to a guaranteed rental, Fast is to pay a percentage of its net profits from theatre operations to RKO, after deducting certain management fees paid to Fast. The agreement originally provided that the film buying for these theatres be done by RKO for a fee of 1% of the gross. In 1937, according to a supplemental letter attached to the agreement, the film buying was taken over by Fast, but the 1% fee continued to be paid to RKO.

Perhaps the most striking provision of this agreement is that under it Fast agreed that it would not extend its busi-

ness outside the cities of Albany, Schenectady and Troy, New York, and that it would not become financially interested in any theatre in any manner outside of those cities. Fast also agreed not to operate the five theatres covered by the agreement in conjunction with theatres located outside these three cities and RKO agreed not to acquire any other theatre interests in those cities.

Now Fast's agreement to confine its operation to these three cities went far beyond the mere restriction of competition between Fast and RKO. It was plainly a provision calculated to preserve from encroachment the theatre operating territory of the other defendants as it excluded Fast from areas in which they and not RKO operated theatres. For example, Paramount, which operates in nearby towns, such as Newburgh and Poughkeepsie, received direct protection by this agreement against any encroachment by Fast on its territory.

Judge Hand: Why do you have to sell theatres in order to cure that, if there is a wrong there?

Mr. Wright: Well, the agreement is, I would say, per se illegal, and of course——

Judge Hand: You seem really to aim at, I won't say nothing, because you are calling attention now to other wrongs, but your great aim is to upset all the ownership of theatres. Now that is an extremely drastic remedy that I should think was extremely unlikely for this court to give. But that is merely a first impression by myself, and I have got to study this thing very carefully in other ways than just by reading through the briefs once, of course.

But this sort of think that you are arguing now is the kind of thing that has always been argued, and remedies have constantly been granted that were thought sufficient. Maybe they have not been against the kind of thing you are calling our attention to here.

Mr. Wright: If the Court please, my only purpose in calling attention to these specific agreements is on this question of intent. Obviously, the particular situation in Albany

might to some extent be remedied by voiding particular competition-restraining agreements. But I am arguing these and calling them to your attention merely as evidence of the fact that there is an express intention on the part of these defendants not to compete as theatre operators.

Now I have not finished the analysis of this situation which shows where Warner came in there at the same time, and it is through Fast that the link between Warner and RKO in that situation occurred.

Judge Bright: May I ask you one question, Mr. Wright?

Mr. Wright: Yes.

Judge Bright: In that restriction to Fast, restricting theatre operation, is there any territorial limit to which that restriction should be confined?

Mr. Wright: He is confined to those three towns.

Judge Bright: I mean outside those three towns is there any limit where he shall not acquire other theatres?

Mr. Wright: No, he cannot acquire theatres anywhere.

Judge Bright: In the United States?

Mr. Wright: That is right. It limits his operation expressly to those three cities—Albany, Schenectady and Troy. He agrees not to become interested in theatres outside those three cities,—that is, not Fabian individually. This is Fast Theatres Corporation.

Judge Bright: That is one reason why I asked the question. Fabian has other theatres.

Mr. Wright: Oh, Fabian operates in partnership with these defendants in many other situations through many other corporations.

Judge Bright: Isn't Fabian Fast, and Fast Fabian?

Mr. Wright: Well, the only thing that appears in the record is that Fabian is president of the Fast Theatres, Inc. a corporation, which executed the agreement, and which operates the Albany theatres and the theatres in Schenectady and Troy.

Now Exhibit 229 is a profit-sharing agreement dated July 2, 1941, between Fast Theatres, Inc., and Stanley Mark-

Strand Corporation, a wholly-owned theatre operating subsidiary of Warner, pooling the operation of three theatres owned by Warner in Albany with the Palace and Leland theatres operated by Fast. The Palace is one of those owned by RKO, and leased to Fast under the exhibit that I just referred to.

Now this Exhibit 229, the pooling agreement between Fast and Warner, provides for the formation of an operating committee composed of representatives of Fast and Warner, to determine the policies of the five theatres and contains the following provision at paragraph 3, page 4, with respect to clearance:

> "Fast, as the operator of the Palace Theatre, Albany, New York,"—that is an RKO theatre—"agrees that in the licensing of photoplays for exhibition in the said Palace Theatre, it shall not obtain clearance over the theatres covered by this agreement in excess of the clearance which the said Palace Theatre now has, and Stanley, as the operator of the Strand Theatre, Albany, New York,"—that is the Warner theatre—"agrees that in the licensing of photoplays for the said Strand Theatre, it will not obtain clearance over the theatres covered by this agreement in excess of the clearance now in effect for said Strand Theatre."

While RKO was not a direct party to this agreement it was a necessary party to any clearance arrangement involving its films, which were committed to the Palace Theatre by the franchise made a part of its lease of the Palace Theatre to Fast in its operating agreement with Fast. (Exhibit 204.)

Now the occasion for this Warner pooling agreement was apparently the construction of a new theatre in Albany by Warner, called the Delaware. Warner had previously owned theatres there for a number of years and had previously pooled its theatres in Troy, New York, with those operated

by Fast, including the Proctor, owned by RKO, by an agreement dated August 30th, 1935, as appears from Warner's 1939 answer to Interrogatory 52a (Ex. 118).

Paragraph 13 of page 15a, of the Albany pooling agreement between Fast and Warner contains the following covenant by Fast:

> "Fast is the owner in fee, in the City of Albany, New York, of a theatre site upon which was formerly erected the Hall Theatre and which was recently detroyed by fire. In consideration of the granting by Stanley to Fast of an interest in the operating results of the Delaware Theatre, as hereinbefore set forth,"—that refers to the provision sharing profits of the Albany operation—"Fast agrees during the term of the lease on the said Delaware Theatre, namely, twenty (20) years from the date of the completion thereof, that it will not erect or permit to be erected on the said Hall Theatre site a theatre building, or permit the said Hall Theatre site to be used for the exhibition of motion pictures, television or vaudeville."

Now paragraph 14, which appears on page 16 of the same agreement, further provides that neither of the parties will own theatre interests in Albany in the future during the term of the Delaware Theatre lease, unless they are operated jointly or unless either party refuses to share in such joint operation.

By an agreement dated July 21, 1943, attached to this Exhibit, this profit-sharing arrangement was extended for a five-year period, expiring in August 1951. Now neither of these Warner agreements purported to restrict Fast's operations to Albany, Schenectady and Troy, but this had already been accomplished by its agreement with RKO. The net effect of all these agreements, read together, was, of course, simply the complete elimination of any theatre operating competition between Fast, RKO, and Warner, in Albany.

Now these agreements I have just referred to are admittedly of a somewhat more complex character than those generally employed by the defendants to accomplish a similar purpose. We did not offer in evidence all of their pooling agreements but we did offer a sufficient number to illustrate the various kinds of express arrangements under which the defendants have limited theatre operating and film licensing competition among themselves and their theatre operating affiliates.

We have digested these agreements in evidence and have submitted copies of the digests to counsel for the defendants, together with an appropriate index, and we are today delivering copies of these to the Court.

Sufficient it is to note here that similar results to these I have just described have been obtained in other cities by straight leases of theatres from one defendant to another, leases conditioned upon the simultaneous maintenance of film franchises, leases coupled with operating agreements relating to general film licensing procedure, operating agreements which share profits, and agreements confining future theatre operations to specific territory. The areas covered by these agreements in evidence include more than 30 towns of widely varying sizes in approximately 25 states and involve all of the defendants in one agreement or another. Agreements of this character do not exhaust the kind of arrangements by which the defendants jointly engage in theatre operations. The instances such as Buffalo, New York, where Paramount and Loew each own approximately 40 per cent of the stock in a theatre operating corporation, Buffalo Theatres, Inc.; or Oklahoma City, where Warner owns a half and Paramount one-quarter of the stock of another theatre operating corporation; or Denver, Colorado, where Loew has a half interest in a corporation in which RKO has the other half—those stock holdings were listed and described together with others at page 6 of our Trial Brief. In those situations, contractual arrangements are, of course, superfluous as a means of eliminating competition between the defendants involved.

All possible combinations of the five theatre-owning defendants are represented by these joint stockholding arrangements or operating agreements. There are only ten mathematically possible two-party combinations of five different parties and these defendants have managed to exhaust all of those possibilities by combinations with one another which expressly eliminate theatre operating competition.

These written agreements and corporate arrangements, the defendants argue, are not enough to establish an intent not to compete with each other, but if they are not, what evidence possibly could establish that fact? We have shown that in the 32 cities of more than 100,000 population, where they operate theatres in nominal opposition to each other, they do not in fact compete for films. We have shown that in a substantial number of cities of all sizes where they might normally be expected to compete with each other if they desired to do so, that they have not done so by express agreement. In the 800-odd towns of less than 100,000 population in which the defendants operate theatres, there are only 19 in which more than one has any theatre affiliations. The details of this national division of theatre operating territory appear in the appendix to our brief. Apparently the only proof that would satisfy the defendants' concept of proof of an intent not to compete with each other as theatre operators would be one gigantic written pooling agreement executed by all of the defendants and their affiliates which provided in express terms for the situation that actually exists, to wit, a stable, arbitrary division of all film product and all theatre operating territory among their theatres. Of course, the so-called Paramount formula deal comes close to being that kind of agreement, as it is in essence an arbitrary division of the theatre market which simply assigns an arbitrary percentage of the national market to each of the circuits licensed under it. The theory on which these circuits are expected to furnish fixed percentages of Paramount's national film rental regardless of the films' performance in their theatres is apparently that each of them has been assigned a fixed percentage of the national theatre market.

All of these agreements are far more direct and decisive evidence of an intent to restrict competition than the Government ordinarily possesses. Normally, we rely on letters or memoranda in which a careless or poorly advised corporate official has expressed an interest in making the kind of an agreement with a competitor which these defendants have actually executed. This industry is one of the few in which restraint of trade remains so firmly imbedded in the practice of its managers that they habitually execute written agreements suppressing competition in the ordinary conduct of their business.

If the Court prefers evidence of restraint of more subtle character, we recommend examination of the Mainstreet Theatre situation at Kansas City, Missouri. This is a 3000-seat, downtown, million-dollar theatre formerly leased to RKO which was once operated with the best pictures available as part of a first run pool covering the Fox, RKO and Paramount theatres in that town. Mr. Rhoden, the Fox theatre head in the area, assures us that it was not suitable for such operation because it was in the wrong part of the downtown area, and it was closed in 1938, after the pool terminated. He does not say why this was not discovered before 1938. In 1941, he states, an independent tried to operate it for two months with vaudeville and feature films of "lesser box-office attraction," but was unsuccessful. Now, in November, 1942, Fox bought a half interest in the fee to that theatre and in January, 1943, RKO bought the other half interest in it.

Now, there is no written agreement regarding it between the joint owners, but it remains closed and the joint ownership of these defendants will obviously prevent any independent who might suppose that he could get suitable film for it from attempting to operate it and thus disrupt the first run situation in Kansas City.

We are told by Mr. Rhoden that a partition suit is pending, and I suppose if the theatre is cut in half it would be permanently removed as a threat to the Kansas City first run situation. According to the defendants' argument, all

theatres are competitive, regardless of affiliation, and no doubt the only way in which the kind of theatre competition they talk about may be suppressed is by physical destruction of a theatre building.

All of this conduct simply reflects a non-competitive condition that is inherent in the corporate structure of the defendant organizations. This structure may not be viewed as existing in a vacuum. The fact that a distributor might conceivably own a theatre circuit which exhibited only the films that it distributes does not make the integrated structure of these defendants, which habitually use each other's theatres as outlets for each other's films, a legal one. The defendants' claim that a distributor's exhibition of his own pictures in his own theatres is legal, as an abstract proposition of law, simply begs the fundamental question posed by this lawsuit. That question is not the abstract one of whether or not one who distributes pictures may lawfully own theatres. The question presented by this suit is whether or not elimination of competition resulting from the continued and habitual use of theatres controlled by each of these defendants as outlets for the films of the others, with the consequent elimination of theatre operating and film licensing competition among them, may be permitted to continue.

Now, the defendants' argument that this established cross use of each other's theatres as distribution outlets is legal because it makes more commercial transactions than would occur if their theatres confined themselves to their own pictures and thereby stimulates what they are pleased to call competition, is predicated on the assumption that they must and should own theatres. Their right to an integrated structure of this kind, if presented in the absence of any showing as to its competitive effects, might well be sanctioned by any court. But these defendants must be judged, not on the basis of how they might theoretically behave, but on what their actual competitive record has been, and this record is one of habitual suppression of theatre operating and film licensing competition among them and with others.

Now, this Court, by their argument, is faced with the alternative of simply assuming the legality of the defendants' theatre ownership because they say it is legal, or subjecting it to the tests of legality announced by the Supreme Court. Now, as long ago as the Reading cases, that Court expressly rejected the argument advanced here that if you don't exceed the powers granted in your corporate charters, your corporate structure is immune from attack under the Sherman Act. The second Reading case clearly rejected the further argument advanced here that if the structure was legal when created, it could not be dissolved by virtue of adverse effects on competition which later developed.

Now, the Supreme Court has never countenanced a non-competitive relationship such as that necessarily resulting from the established cross use of the five largest theatre circuits in this country as market outlets for the films of the five largest distributors. In approving the pooling of certain oil cracking patents among four oil companies which did not and could not dominate the production or marketing of the finished product, gasoline, the Court said in Standard Oil v. United States, 283 U.S. 163, at page 174:

> "Where domination exists, a pooling of competing process patents, or an exchange of licenses for the purpose of curtailing the manufacture and supply of an unpatented product, is beyond the privileges conferred by the patents and constitutes a violation of the Sherman Act"

And the same language, of course, applies with all the more force to an exchange of licenses which fixes prices.

Now, these defendants might conceivably argue that there are alternative remedies for dealing with this situation, but they cannot justify its continuance under the Sherman Act. Dissolution is not an end in itself, but only an established judicial means of terminating an unlawful combination. They could, for example, with some plausibility, argue that if a theatre-owning distributor were prohibited from licens-

ing its films to theatres owned by another distributor and if theatres affiliated with a distributor were similarly prohibited from licensing the films released by other theatre-owning distributors, for exhibition in their theatres, the relationship between them might conceivably be made competitive without divorcement. But since they themselves obviously prefer to give up their theatres rather than the right to such cross use of films, there is no alternative but to terminate——

Judge Hand: Who says that?

Mr. Wright: Well, their argument certainly by implication says it.

Judge Hand: I did not think so. They are arguing for every point they can make, as lawyers generally do, and just as you are doing. I do not see any implication at all from their argument in their briefs that they would prefer divorcement of their theatres and dismembering everything to restriction to the kind you are talking about now.

Mr. Wright: Well, quite apart from that, and assuming there is no implication in their brief of any such argument, I merely point out that if the defendants or the Court can devise or knows of some relief which would accomplish the same result, we would welcome it ourselves as an alternative to dissolution, because we recognize that that is a last resort proposition which should only be used when other means have failed. But I am merely pointing out that on the basis of experience nothing else that has been done over the long period of time in which we have been trying to solve this problem has or gives any promise of restoring or making competition among these integrated companies possible except dissolution.

Judge Bright: I have just been wondering: Assuming we go a hundred per cent with your demand for dissolution, where does it leave this industry? And where do you start from there, and in which direction do you go?

Mr. Wright: Well, in the first place, the first thing it does for this industry is to free the exhibition business as

such from distributor domination. You then have an industry where your distributors are behaving as distributors with a sole eye to film rental and your exhibitors are operating their theatres on an independent basis with a view to satisfying the requirements of theatre operation.

Now, I do not say that that alone solves the problems of the industry. In my view, when you are dealing with a situation such as you have here, where restraint of competition has become so firmly imbedded in an industry structure, there is not any one step that you can take that will make competition where competition did not exist before. The most that can be done in any event is to work out provisions which will make competition possible and which will prevent the continuance of the restraints which have been found to occur in it in the past.

Now, on this problem of competition among these defendants, it seems to me there is no way of eliminating the habitual restraint of competition among them without preventing this cross use of each other's theatres as exclusive outlets for them as distributors.

Judge Hand: Now you are arguing for this different remedy and really not arguing for the situation where it might well be said, as they said about Agricola, he made a desert and called it peace.

Mr. Wright: I am merely suggesting that as an alternative remedy. I do not think myself that it is as adequate a remedy of dissolution. But I point it out as simply another means of attempting to accomplish the same result; and I say there is nothing in the defendants' attitude to indicate that they would not regard restrictions of that character as any more desirable than the more traditional method of an actual dissolution of these combinations through stock divestiture.

Judge Bright: Doesn't your argument impliedly admit that there is keen competition in distribution?

Mr. Wright: I think not. I do not see how there can be any more competition in distribution as among the five integrated distributors with this system of cross use of each other's theatres as outlets than there can be competition among them as theatre operators. They are constantly making agreements with each other which directly restrict their conduct as distributors. Now, you can't——

Judge Bright: It does not restrict their conduct as distributors. It finds a sure market for distribution.

Mr. Wright: Well, I call your Honors' attention to the provision that I just read from the operating agreement in Albany where the agreements were made as to what clearance restrictions should be imposed. Now, that is an express agreement but impliedly, whenever one distributor is licensing the theatres of another distributor, he is, in effect, agreeing to impose similar terms and similar restrictions with respect to his theatres, because the affiliated theatre with whom he is dealing——

Judge Bright: Doesn't it more definitely fix the clearance provisions that have already existed in the business?

Mr. Wright: If the Court please, assuming that it does, that does not make it legal. Now, this clearance structure—there is no proof in this record, despite the defendants' allegation that the clearance structure that you have in this industry existed prior to the organization of these integrated groups. That structure is itself a product of this system. You did not have these elaborate clearance and run structures back in the days when there was no affiliation. I think if you will look at those early license agreements in evidence you will see that there is no printed provision for admission prices such as you now have and that the whole character of the business did undergo a change when your distributors became interested in theatre operation, and vice versa.

Now, the mere fact that many of those clearance structures are long established cannot possibly save them. Now, if their effect——

Judge Hand: That is true, of course, but what I would like to get at is whether really you think there should not be any clearance provisions at all by anybody; anything?

Mr. Wright: Precisely.

Judge Hand: You do?

Mr. Wright: That is right.

Judge Hand: You didn't once.

Mr. Wright: That is right.

Judge Bright: You do not want to scrap the consent decree completely, then?

Mr. Wright: In so far as it purports to arbitrate the clearance, quite definitely.

Judge Bright: In other respects, too?

Mr. Wright: Yes.

Judge Hand: Isn't it simply a question of arbitrating, as Judge Bright says? You don't want any clearance provision under any circumstance?

Mr. Wright: That is quite right. We feel that the distributor should be free to determine his run and clearance structure without making any express agreement with any exhibitor in the area.

Judge Bright: That carries you right back to the copyright owner's right to sell his product.

Mr. Wright: That is quite right. It depends on the interpretation of copyright.

Judge Goddard: If I understand, the cost of a print, of an ordinary picture, is $150 to $300 and for technicolor, $600 to $850. I also understand that a great many, perhaps thousands of the smaller theatres pay less than the cost of a print.

Mr. Wright: That is right.

Judge Goddard: How would you work that out?

Mr. Wright: The distributor needs to make no clearance agreement with anybody to distribute whatever number of prints he has got in the manner in which he thinks is most advantageous. He would, I presume——

Judge Goddard: I want to understand that, because it seems to me that is what he is doing now. My question seems to me clear. Where the price of the print is more than the theatre pays, if you don't have clearance, what would you do? How would that theatre get pictures?

Mr. Wright: The absence of a clearance agreement does not in any way prevent the distributor from making such multiple use of the prints he has got as he can by licensing as many exhibitors as he can deliver a print to. There is nothing to prevent him from doing that. He does not have to make an agreement with any exhibitor in order to efficiently use his print supply.

Judge Goddard: How would he determine to whom he would give his print? I mean, there would be no clearance? You would say if he did not give it to A that A was discriminated against.

Mr. Wright: Well, I suppose that he would use his best judgment as to where he thought the pictures ought to play and when. He would, of course, include in his license provision, I suppose, the dates and places where the picture was to play in the particular theatres that he licensed, but he does not have to make a further agreement with that exhibitor as to where they shall play subsequently in order to license them to some subsequent run.

Judge Goddard: Don't you come down, finally, to the proposition that one theatre must have it in advance of another? Isn't that essentially clearance?

Mr. Wright: This record very clearly shows that one theatre does not have to have the print in advance of another. In many situations that obtains. 15 or 20 theatres in Baltimore play virtually simultaneously, and in some first-run situations you will find two and occasionally three theatres playing day and date.

The matter of how many runs you have in a particular sequence and where they occur is something that we think can be safely left to the distributor's own judgment without encumbering that judgment with agreements to operate in a

certain way in the future, which give these theatre operators, as such, protection from competition.

I think if you examine this structure objectively you cannot help concluding that the main purpose of clearance is to control and regulate theatre operating competition, and, as such, it is, of course, principally in the hands of theatre owners rather than distributors.

Judge Goddard: Now, Mr. Wright, supposing we were to decide that clearance should be done away with, how would you handle this question that I have just raised?

Mr. Wright: I do not think it is up to the Court to handle it. I think it is up to the distributor to handle it. The decree would simply prohibit him from making an agreement with any exhibitor as to the terms on which he would serve his pictures to other exhibitors. He would be left free, of course, to license his film to such exhibitors on such runs as he thought would give him the most revenue in the particular area where he was serving his prints.

Judge Goddard: Isn't that what he is doing now?

Mr. Wright: No.

Judge Goddard: Exercising his judgment?

Mr. Wright: Not at all, if the Court please. I think the agreements in evidence very clearly show that he in many cases makes an express agreement to abrogate any exercise of judgment. He says that for a certain period of time you shall have, that is theatre A, shall have a priority over theatre B on all my pictures. That kind of agreement is not necessary to permit him to efficiently distribute his prints, and that is what the clearance system today is, is one which fixes a theatre's status. That is the way it performs; that is the way it functions. There is no justification, in our view, for the use of these restrictions to fix theatre operating status.

Judge Hand: Would you ask for a decree that the picture owner or distributor would only play his pictures in his own theatre or in that of the independents?

Mr. Wright: That kind of decree might be a substitute for divorcement if it were coupled with, of course, a freeze

on theatre acquisitions, because if you had unrestricted interchange of theatres, you would have a situation such as Kansas City, where five of these people each has a first-run theatre.

I would expect that kind of provision to lead really to the divorcement of theatres, because it would take the monopoly value away from them that they now have, and if you took that away, I don't think these defendants would want them. That is the main purpose of their structure, is to use these outlets as a means of preferential treatment for each other.

Judge Hand: You think they would prefer total to partial divorcement?

Mr. Wright: That is a matter for them, I think, to express themselves on. I do not pretend to know.

Quite apart from the obvious elimination of competition between the five integrated groups which has occurred by virtue of their corporate structure, that same structure has a very substantial effect in eliminating theatre-operating competition among the various units affiliated with each defendant combination. The Paramount combination, for example, consists not only of a parent producing and distributing corporation and a parent theatre-operating company, but numerous subsidiary theatre-operating corporations, many of which are only half owned by Paramount and are claimed to operate on a highly independent basis, although subject to negative control by Paramount's New York office, which nominates half of the directorate. There is no dispute about the fact that all of these corporations, whether 50 per cent owned or 100 per cent owned, cannot acquire a theatre without approval of the parent organization. The fact that they all confine their operations to separate territories is, therefore, not a matter of mere chance. Paramount is able to enforce the kind of geographical pattern of theatre ownership among these affiliates that is most compatible with the general division of theatre operating territory among all defendants. If local management autonomy has the stimu-

lating effect on efficiency claimed for it by the Paramount witnesses, why should their theatre acquisition activities be directed and controlled by Paramount's New York office any more than their film licensing activities? We think the answer lies in the fact that Paramount could not, in the absence of such control, prevent theatre acquisitions. But the allocation of films among them may be and is accomplished simply by concerted action among the major distributors, the control of all of which is centralized in New York City. Thus, in the case of Paramount, dissolution of the combination is essential not only to permit competition between the Paramount affiliates and other defendants' theatres in licensing films, but is also needed to eliminate the restraint of theatre operating competition now imposed through Paramount's control of the number and location of the theatres they operate.

As for the Fox group, the defendant National Theatres Corporation admittedly has no business function except to operate as a holding company for the various Fox theatre circuits, and link them to the Twentieth Century Fox-Fox Film Corporation, the producing and distributing member of the combination, which owns all of National's stock. The circuits which National owns are also claimed to operate——

Judge Hand: What do you want to do with them, providing all others should be held pure and untainted?

Mr. Wright: I don't think you can hold all others pure and untainted.

Judge Hand: I know you think that. Of course you think that. I am trying to see what your, what I might call, territorial or local grievances are. That is the reason I asked you this question at the beginning.

Mr. Wright: In this case you cannot effectively give the relief against grievances of a primarily local character. The purpose of the case is to attack the general monopolization——

Judge Hand: Of course.

Mr. Wright: (Continuing)—of domestic business.

Judge Hand: I know that. It is evident from your complaint and your brief and everything else, but I had asked you whether you claimed that these regional practices were in themselves bad as between——

Mr. Wright: We do.

Judge Hand: Now, wait a minute. (Continuing)—as between—well, you were just talking about Fox Film; I spoke of that because of the California situation—between Fox Film and their own affiliates?

Mr. Wright: Yes, we say that relationship is illegal per se and should be dissolved.

Judge Hand: What would you do there?

Mr. Wright: Well, the first thing that it seems to me you would obviously have to do would be to dissolve National.

Judge Hand: Forget for a minute this over all contention about divorcing theatres everywhere in the United States. What would you do about Fox if Fox were here alone?

Mr. Wright: That is what I said, the first step, as I see it, would be to dissolve National Theatres Corporation, which is the link between Twentieth Century-Fox Film and these five large circuits in which National owns all of the stock—all of National stock being owned by Twentieth Century-Fox Film. I simply wanted to point out what restraints that theatre operating——

Judge Hand: In other words, you would say, if Fox owned the whole thing, which it does not in a technical, legal sense, and there were no other defendants in the case, that they would violate the Sherman Act and should be dissolved?

Mr. Wright: As to whether or not, if there were a single corporation involved, you would reach the same result, I think there might be some doubt. That is, we do rely——

Judge Hand: You are claiming here that they are essentially one, that they act together, and yet you do not

want to say, if they were one, that they would violate the law that the aggregate violates?

Mr. Wright: That is right, if the Court please. There are certain disabilities that you encounter by a multiple corporate form of business organization under the Sherman Act that you might not encounter otherwise. There may not be a rational basis for that distinction but I think it is found in the decisions of the courts.

In the General Motors case, for example, the two corporations were found to have conspired with each other to restrain trade. One was wholly-owned by the other and operated as a virtual department of the parent, and yet, for Sherman Act purposes, they were held capable of conspiring and combining with each other, and I think we do have to look at these structures as they actually exist in determining liability rather than as they might be under some other scheme of control.

The restraints on theatre operating competition placed on these Fox circuits as a result of their common ownership by National is perfectly clear from evidence that these Fox circuits, in addition to this common acquisition control, have from time to time simultaneously executed similar film licensing agreements with other defendant distributors which amount to concerted film buying, and that the effect of such combination has been to permit these circuits to virtually take over the distribution of the films of other defendants in the areas where they operate. An example of that is Exhibit 383, which consists of five simultaneous agreements between United Artists and the five principal Fox theatre circuits, being executed for the exhibitors by Spyros Skouras, president of National.

In the case of Warner, the defendant Warner Bros. Circuit Management Corporation concededly does the buying for the entire circuit, as is the case with Marcus Loew Booking Agency for the Loew Circuit, and RKO Film Booking Corporation for the RKO circuit.

All of these film-buying corporations are wholly owned by the respective parent corporation and are effective means by which a whole series of corporations with various degrees of affiliation with each other and with the parent companies are combined together for film-buying purposes. They operate to restrain film licensing competition on a scale far greater than the buying combinations condemned by the Crescent and Schine cases. Their continuing existence clearly cannot be justified if the law of those cases is to be applied to these defendants. In short, we submit that the law requires that each of the theatre-operating affiliates of each of these defendants must be made to stand on its own competitive feet by positive dissolution measures of the kind that have already been applied to much smaller units in the industry.

Mr. Marcus: If the Court please, Mr. Wright has pointed out the absence of competition among the theatre-operating defendants. This absence of competition is a large part of a still larger picture of a competitive rigor mortis in this industry.

The eight defendants have adopted and maintained for many years a system of distribution designed and effective to restrain competition among exhibitors and to promote regional circuit monopolies. There has been little variance between any of these defendants in the tenacity with which they have clung to this system or in their conscious use of it to promote the interests of the affiliated and independent circuits to the detriment of the smaller independent. At the time of the consent decree the theatre-operating defendants, faced with the possibility of divorcement of their theatre interests, consented to a slight, but as we shall show, quite inadequate modification of this system. Columbia, Universal and United Artists, not having theatres, have not consented to any modification of it.

This system has for its core the use of restrictive licensing provisions and the well-established business policy of these defendants to fix the status of the smaller independent

and to deny him the opportunity of getting out of that status, save as shown in the Crescent, the Schine and in this case when, in response to the wishes of a circuit, they reduced that status.

We will limit our discussion of licensing restrictions to admission prices, clearance and block booking, blind selling. We have collated in our brief at pages 78 to 88 other license provisions which have been used to effect a situation in this industry well within Section 1 and Section 2 of the Sherman Act. As to those provisions, we should hope to be heard with respect to the form any injunctive relief which may be decreed in this case takes.

We note that in variety these restrictions compare with those in the Hartford-Empire and the Sugar Institute cases and, as in those cases, their variety has been a measurable factor in keeping the industry in a largely non-competitive condition.

While we shall argue the illegality of each of these three practices as such, we also take the position that each restriction is illegal as part of the general plan used by these defendants to control the industry unreasonably, and we take the further position that these eight defendants have combined to restrain trade with respect to these and other practices.

All of these defendants have knowingly used these restraints over a long period of time and much of their restrictive force has been derived from the community of their use by all of the eight distributor defendants.

As was said by the Court in the Bigelow case, recently decided:

> "Knowing participation by competitors without previous agreement in a plan, the necessary consequences of which, if carried out, is unreasonable restraint of interstate commerce, is sufficient to establish an unlawful conspiracy."

The same thought, in slightly different words, was expressed by the Court in the Goldman case:

> "Uniform participation by competitors in a particular system of doing business where each is aware of the other's activities, the effect of which is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the statutes before us."

The scope and effect of this restrictive pattern of distribution may be pointed out by a brief reference to some of the cases decided within the past ten years.

Judge Hand: Of course, you are really claiming they are contributory infringers, aren't you?

Mr. Marcus: No, your Honor.

Judge Hand: It is the same kind of thing.

Mr. Marcus: No, your Honor. Our claim here is that they have combined to put this industry under a system of restriction so broad that the system can operate only under those restrictions.

Judge Hand: Oh, no. I don't mean your general claim. I am talking about this Bigelow quotation and that sort of thing.

Mr. Marcus: Well, the Bigelow——

Judge Hand: Universal and Columbia and United Artists.

Mr. Marcus: No, your Honor, that quotation from the Bigelow case is on the question of combination by these defendants to do two things, one, to set up a system of restrictive licensing, and, two, to combine with respect to each of the three particular restrictive provisions that I shall deal with.

In the Interstate Circuit case, all of these defendants aided an affiliated circuit in Texas and New Mexico to restrict competition of independent exhibitors and support a local monopoly by restrictive license agreements. In the Perelman case the so-called Big Five and United Artists used restrictive licensing provisions to restrict competition of

other producers and competition of independent theatres in Philadelphia with affiliated theatres. In the Schine case restriction of independent competition with the Schine Circuit and support of its monopoly position in large areas in New York, Ohio, Kentucky, Delaware and Maryland were given by all these defendants through the use of restrictive licensing agreements and denying independent exhibitors an opportunity to negotiate for product which Schine desired to use or desired should not be used by his competitors.

Similarly in the Crescent case which involved a large area in the south central part of the United States, these defendants with the exception of Columbia and Universal, helped the Crescent circuit restrict competition of independent exhibitors and secure the circuit's dominance.

In the Goldman case, all of the defendants gave united support to Warner's monopoly of first run exhibition in Philadelphia by denying independent exhibitors the opportunity to negotiate for a first run status. In the Bigelow case, the theatre operating defendants aided a Paramount circuit and a Warner circuit in Chicago to restrict independent competition by keeping the independent exhibitor in a subordinate status through the use of an illegal run and clearance system.

I shall turn now to the question of fixing minimum admission prices. Admittedly all of the defendants use license forms providing for the fixing of minimum admission prices. Admittedly the minimum admission price is inserted as a term of the contract in a great many of the contracts of all of the defendants. It is immaterial whether the exhibitor or the distributor initially determines the specific minimum admission price inserted. Once inserted, it becomes a price-fixing agreement.

The defendants rely on their copyright to justify this kind of price fixing. But it is well established that neither a patent nor a copyright can justify a combination or conspiracy fixing prices whether the subject matter is or is not patented or unpatented, copyrighted or uncopyrighted. It

is also well established that neither a patentee nor a copyright holder may use his patent or copyright to restrict competition in what is unpatented.

Judge Goddard: Mr. Marcus, would you say that if there were no conspiracy that the distributor might fix the minimum admission price?

Mr. Marcus: No, your Honor, and that will be another point in my argument.

Judge Bright: Well, was there any fixing of admission price?

Mr. Marcus: Yes, there is.

Judge Bright: They go to an exhibitor and they say, "We will permit you to exhibit this picture for so much providing the theatre charges so much." That is the amount that the man has been charging. Or the reverse of that. The exhibitor goes to the distributor and says, "We will purchase the right to exhibit the picture and we are willing to agree that we will charge so much." Is that price fixing?

Mr. Marcus: Well, your Honors, according to the testimony of the defendants and their argument what happens is that the distributor merely inserts the going admission price of the exhibitor or a price suggested by the exhibitor and each distributor knows that the minimum admission price rarely, if ever, varies from picture to picture.

Judge Goddard: That price fixes terms upon which he may license the feature, doesn't it?

Mr. Marcus: Yes, but there is one other element, your Honor.

Then we have a situation where each defendant, knowing that the other distributor is going to enter into a similar price-fixing agreement, enters into such an agreement, and this sort of concerted action is illegal under the Interstate Circuit case. That in that case it was charged that this sort of concerted action was carried on on the basis of regional price fixing and this one is carried on on the basis of national price fixing certainly cannot help the defendants, and under the Ethyl, Univis, and Hartford Empire cases that is an added factor of illegality.

Judge Bright: Isn't that the case where the distributor said we will not sell your film unless you make the exhibitor raise his admission price? How do you take the position that that is anywhere similar to the situation generally?

Mr. Marcus: We have the parallel situation here, your Honor, where the exhibitor invites each distributor to fix by agreement a certain minimum admission price and of course he knows the admission price of subsequent runs are also going to be fixed, and each distributor getting that invitation enters into similar agreements. It is our position that thus we have a decision similar to the Interstate Circuit case and in that case the court held——

Judge Bright: You say the exhibitor invites the distributor to fix the admission price?

Mr. Marcus: That is the position——

Judge Bright: Is there any evidence of that in this case? Isn't there evidence just to the contrary?

Mr. Marcus: Well, I should have said, your Honor, that the exhibitor invites the defendants to take the admission price that he suggests and in each case each distributor knows that he is going to get a similar invitation, and knowing that, enters into similar price fixing agreements. And we take the position that that brings the situation under the Interstate Circuit case. It was recognized in the Bigelow case where the Court said that the Interstate case "also holds that a conspiracy fixing the minimum admission prices for the exhibition of copyrighted motion picture film is illegal," and in the Schine case Judge Knight cited the Interstate Circuit case as clearly pointing to the reasons for condemning minimum admission price and clearance provisions in a film license contract, and there is no such situation in the Schine case as there was in the Interstate Circuit case.

Judge Goddard: Mr. Marcus, hasn't the copyright owner the absolute right to say on what terms his picture may be shown, such as for instance the charges to be made, in the absence of concerted action?

Mr. Marcus on behalf of Government

Mr. Marcus: We would take the position that he has no right to enter into a price fixing agreement for that purpose.

Judge Goddard: You mean he may not say how much may be charged for seeing his picture? This is in the absence of any concerted action.

Mr. Marcus: That is right. Any restrictions must be judged on the basis of the context in which it is to be found, and we say that in the context of this industry a single agreement by a single distributor would be illegal, especially of course in this industry where each distributor makes a wide series of such agreements all over the country.

On this question of combination we also assert that even if the same minimum admission price were not fixed by each defendant distributor a combination to fix minimum admission prices is illegal whether or not it is a combination to fix the same admission price or not. And this was pointed out by the Court in the Socony-Vacuum Oil Company case, 310 U.S. at page 222.

Judge Bright: Conceding your statement that a combination to fix the price is illegal, what evidence is here that there is a combination to fix prices?

Mr. Marcus: The uniform practice of the defendants. Our argument on this matter of combination is that each defendant distributor knows that the other defendant distributor is getting an invitation from the exhibitor to enter into a price fixing agreement and enters into a similar price fixing agreement.

Judge Bright: You keep calling it a price fixing agreement. Isn't it an agreement to license film upon certain terms and those terms are based upon what admission price the exhibitor says he will charge in his theatre?

Mr. Marcus: Well, your Honor, the minimum admission price is the term of the contract.

Judge Bright: I understand that. But is it a price fixing proposition?

Mr. Marcus: We say yes, once the defendants inserted it as a term of the contract. We might call the contract as a

whole a license merely because it covers a great many restrictions, but if one of the restrictions covers price fixing we might also properly call it a price fixing agreement, just as we might call a license agreement a clearance fixing contract.

We call the Court's attention to the fact that if as stated by the defendants——

Judge Hand: Have you got any decisions holding such a thing as that?

Mr. Marcus: Well, your Honor, we feel that the Interstate Circuit case, the Bigelow case, the Goldman case, and also the recently decided American Tobacco case in 147 Fed. (2d) 93—that is a case we did not cite in our brief.

Judge Hand: Well, those cases had very different features, didn't they? Repression and exclusion? Were they based on the price fixing theories that you are urging now?

Mr. Marcus: Yes. They were based upon a finding of conspiracy and combination in a substantially uniform concert of action which is what we charge here.

Judge Hand: To do what? To do what?

Mr. Marcus: In the Bigelow case one of the elements of the case was to fix minimum admission price and in the Tobacco case the price fixing element was the crux of the case.

We call the Court's attention also to the fact that if as stated by the defendants they let the exhibitor fix the minimum admission price then the use of a common agent for this purpose brings them within the Masonite case.

Now we have argued in our brief and we now take the position that a single distributor may not fix minimum admission prices, and that agreements to that effect are outside the copyright privilege and within the Sherman Act. It has been suggested by counsel for Columbia in a book written by them in 1917 entitled "The Law of Motion Pictures and The Theatre", at page 481, that the rights of restrictive licensing by a copyright holder are less than those of a patentee since the copyright law gives no right of exclusive use. This dis-

tinction was again pointed out in a Symposium on Copyright Law in 1940 in a book entitled "Third Copyright Symposium" at page 285.

Our case on this point need not rest on such distinction, however. The minimum admission price is not a price fixed for the copyrighted article. It is a price fixed for an entertainment program of which the copyrighted picture is merely one part.

In the Interstate Circuit case the court said:

> "Because the patentee has power to control the price at which his licensee may sell the patented article, it does not follow that the owner of a copyright can dictate that other pictures may not be shown with the licensed film or the admission price which shall be paid for an entertainment which included features other than the particular picture licensed."

Judge Goddard: The reason for that is that that agreement attempted to regulate something beyond one copyright.

Mr. Marcus: Well, this price fixing of minimum admission prices does exactly that too, your Honor, because the program of entertainment for which you and I pay at the ticket office always covers more than the single feature licensed. It is well known that the theatre entertainment program includes such things as shorts, newsreels, and various other things.

The lack of relevance of the minimum admission price to the copyright is seen by the fact that whether the licensing contract covers one or 50 pictures, the price does not vary, except in the case of road shows.

In the case of United States v. Univis Lens Co., 316 U. S. 241—I don't believe that we cited that case in our brief—where patents on a particular lens blank were used through a license system to control the price of the finished lens, the court assumed that the patent was not fully practiced until the finishing licensee had ground and polished the blanks.

The Court said:

> "But merely because the licensee takes the final step in the manufacture of the patented product, by doing work on the blank which he has purchased from the patentee's licensee, it does not follow that the patentee can control the price at which the finished lens is sold."

So in the instant case the fact that the theatre operator in order to practice the copyright has to provide other facilities and entertainment cannot justify control by the distributors of the finished entertainment.

In the Ethyl case at page 456 the Court pointed out that a patentee could not condition his license so as to control conduct by the licensee not embraced in the patent monopoly.

This sort of price fixing present in this case is merely another form of an arrangement to control matters not within the scope of a patent or copyright condemned in Motion Picture Patents, Carbice, Mercoid and many other Supreme Court cases.

As is clear from the record this system of minimum admission price fixing is applied to all runs in order to protect the earlier account. Price fixing for this purpose is clearly illegal under the Interstate Circuit case.

As in the case of other restrictions, minimum admission price restrictions have been deliberately used to discriminate against and even to eliminate a smaller independent exhibitor, to favor his affiliated or other circuit opposition. This is noted in Judge Knight's opinion in the Schine case, in some of the Appeal Board decisions in evidence and illustrated at pages 53 to 56 of the Government's brief.

Those page references, your Honors, are page references to the brief first given to your Honors and not our printed copy, which we are offering to the Court today. The pagination differs somewhat because ours is in larger type.

Judge Bright: Are you going to substitute another brief for the one we already have?

Mr. Marcus on behalf of Government

Mr. Marcus: Yes. That brief was printed up by the defendants. We now have had ours printed by the Government Printing Office. The print is considerably larger.

Mr. Davis: It would be very embarrassing to us, your Honors, if that original brief was discarded because all of our briefs follow the pagination of the brief you have in your hands.

Judge Bright: I don't see why that should have been done. We have to get some kind of a brace to support them now.

Mr. Marcus: My page references will refer to that first brief. There were such things as the pagination of the index which the printer for the defendants took no particular care to make correct, which we have done in our brief.

Judge Hand: Well, you are going to introduce a little more confusion into the case, that is all.

Mr. Proskauer: Your Honors understand that all our references to the plaintiff's alleged brief refer to the brief that you have in your hand, Judge Bright. That will save some confusion.

Judge Bright: The first brief is the alleged brief, is that it?

Mr. Proskauer: Yes.

Mr. Davis: It almost makes us regret our helpful disposition in which we assumed the printing of that brief in order to expedite the Government's labors.

Mr. Marcus: We appreciate that, Mr. Davis, and we will refer as far as pages are concerned, to those briefs.

Judge Goddard: What will we gain by taking a different paged brief?

Mr. Wright: If the Court please, at the time the brief was finished, we could not get a quick brief out of the Government Printing Office. We therefore turned over our typewritten brief to the defendants on the due date. They printed it, served themselves, gave a copy to your Honors. We gave a copy to the Government Printer to print on December 17th.

We did not get a page proof—could not get a page proof back until January 10th, and we got the finished brief yesterday. Now we offer it to you because it is in larger type; it is easier to read; the index has been corrected so it is more usable. If your Honors do not want to use it we certainly do not want to insist that you do, but we have had it printed up for your convenience

Judge Hand: Well, we had better not do that. You see, we have got this all worked over and marked up and everything else, and it is plain enough to read, and it has been printed and submitted, and I assume there are no glaring errors that you wish to call our attention to.

Mr. Wright: There are number of typographical errors which we have also undertaken to correct on this brief. We do not have any extra copies of the other.

Judge Bright: The trouble is that the defendants have referred to the paging of the original brief in theirs.

Mr. Wright: That presents no difficulty. You have a copy of the brief to which the pages refer.

Judge Bright: Isn't that some more work for us to find out what the new pages are?

Mr. Wright: It is offered only as a convenience. If the Court does not want it, that settles it.

Judge Bright: It is not a convenience.

Judge Hand: We do not want it.

Judge Goddard: What I might suggest, if there are any typographical errors in the first brief, I would like to know that.

Mr. Wright: There are, yes.

Judge Hand: Well, I would not like to know them unless they are important. I mean, one of the vices of any long case is correcting minutes and correcting things all the time having no importance. Now if you have got anything important here, of course we ought to know it.

Judge Goddard: I only mean important ones, of course.

Mr. Marcus: I shall now take up the question of clearance.

Mr. Marcus on behalf of Government

Judge Hand: Take up the question of what?

Mr. Marcus: Clearance. Mr. Wright has already stated that the Government's position is that clearance agreements are illegal under the Sherman Act. Generally speaking there are two types——

Judge Hand: Have you been converted too from the state of original sin only a little while ago?

Mr. Marcus: No, your Honor.

Judge Hand: You mean you are pure from the beginning?

Mr. Marcus: From the very beginning. Generally speaking, there are two types of clearance agreements used in this industry. One type consists of an agreement between an exhibitor and a distributor whereby it is agreed that another exhibitor shall be prohibited from showing pictures until the lapse of a specified time interval. The other type consists of an agreement between an exhibitor and a distributor that the former will not show a picture until a specified time after it has been exhibited by another exhibitor. On the one hand we have an agreement between A and B that C shall restrict his competition with A. On the other hand, we have an agreement between A and B that A will restrict his competition with C.

We submit that these types of agreements and combinations are clearly illegal under the Sherman Act.

Judge Bright: How are you going to take care of the problem then that C, the last man to use the picture, is not willing to pay the price for the first exhibition.

Mr. Marcus: I think there are two answers to that, your Honor. That again seems to assume that a system within the Sherman Act would not work in this industry, and we take the position that that is contrary to the premises——

Judge Bright: No. I assume that it is not a violation of the Sherman Act. Now why is it that C cannot pay the price for the first exhibition of the picture?

Mr. Marcus: We do not say he cannot.

Judge Bright: I am assuming he cannot. Would there be a violation of the Sherman Act because he sees fit to buy the pictures upon the understanding that he won't show it for 30 or 50 or 60 days later than the fellow who is willing to pay the price?

Mr. Marcus: Well, one of the principles of the Sherman Act, your Honor, is that what might be done without agreement may be illegal when done by agreement; and in my argument I refer to a case which makes that distinction.

Judge Bright: What would be the benefit of beating the devil around the bush?

Mr. Marcus: Your Honor, in the Interstate Circuit case——

Judge Bright: The Interstate Circuit case? How is that parallel to this situation? There was an exhibitor who just held up a distributor, saying, "If you don't make them charge so much we won't buy your film." How is that parallel here?

Mr. Marcus: That is quite right here. But the defendants in their joint brief, in their arguments on clearance restrictions, almost exactly parallel the argument made by the dissenting opinion in the Interstate Circuit case, and that part of the dissenting opinion dealt with clearance agreements.

Judge Bright: If they lay down with the dissenting opinion, do they get up with fleas?

Mr. Marcus: The thing is, your Honor, that that sort of argument was rejected by the majority of the court. Mr. Justice Roberts took the position that under the majority opinion in the Interstate Circuit case, the clearance agreement would be illegal.

Mr. Raftery: I could not hear you. Who took that?

Mr. Marcus: I believe it was Mr. Justice Roberts who wrote the dissenting opinion.

We may call the Court's attention to the fact that unlike the——

Judge Hand: You will have to repeat that again. It does not make sense to me. What are you claiming about the Interstate Circuit case?

Mr. Marcus: That the argument used by the defendants in their joint brief to justify the validity of clearance agreements as such parallel the arguments made by the dissenting opinion which used what was done in the industry with respect to clearance agreements as a justification for reaching the result contrary to that which was reached by the majority opinion.

Judge Hand: That may be, but the decision did not turn on any such point, did it?

Mr. Marcus: Well, I would have to say that in my opinion, no, your Honor, but the dissenting—well, just a minute, your Honor. The dissenting opinion thought that unless the majority opinion were willing to take the position that clearance agreements as such were illegal, they could not have reached the decision they did reach.

Judge Hand: This present argument you are making from the Interstate case seems to me utterly unpersuasive.

Mr. Marcus: Well, it was unpersuasive to the majority in the Interstate Circuit case, that is, the argument that was made by the three dissenting judges.

Now even if there were a copyright privilege permitting restrictive licensing, we submit the defendants are no better off. According to the defendants' testimony, the exhibitor tells each distributor what his clearance is with another distributor and asks for the same clearance from each. This invitation is accepted and thus we find substantially uniform clearances in many situations. This sort of combination in response to an exhibitor's invitation is clearly illegal under the Interstate Circuit, Bigelow and Goldman cases.

The use of a copyright by any of these defendants to set up, as in this case, a national system of clearance restrictions, goes far outside any possible copyright privilege. The national scope of licensing restrictions was, in our opinion, one of the elements in the court's decision in the Masonite,

the Ethyl and the Hartford-Empire cases. In all of those cases a restrictive licensing system was used. And, of course, a copyright does not give one a license to use it to protect others from competition.

Turning to defendants' claim of long use and essentiality of clearance, we will refer the Court to the B. B. Chemical case, in 314 U.S., 495. In that case, in discussing the restrictive use of a method patent, the court said:

> "It is without significance that, as petitioner contends, it is not practicable to exploit the patent rights by granting licenses because of the preference of manufacturers and of the methods by which petitioner has found it convenient to conduct its business. The patent monopoly is not enlarged by reason of the fact that it would be more convenient to the patentee to have it so, or because he cannot avail himself of its benefits within the limits of the grant."

The argument of long use to support the use of basing points restrictive of competition was rejected by the Supreme Court in the recent cases of Corn Products Co. v. Commission, 324 U.S. 726; the Trade Commission v. Staley, 324 U.S. 746.

Clearance and minimum admission price fixing have, of course, a long history of mutual support to fix not only minimum admission prices but also the film rentals of the films licensed. There is nothing in the copyright law or in any other law which permits such price fixing arrangements. Judge Knight, in the Schine case, rightly points to the Interstate Circuit case as inconsistent with the existence of these two types of restrictive agreements in a license.

It is true that in private suits, where a particular exhibitor was simply trying to better his position in the system, a number of lower courts have assumed that the certain local clearance systems were valid in denying relief to these plaintiffs. Thus in the Westway Theatre case cited by the defendants, we find the Court upholding agreements

between distributors and an exhibitor in Baltimore, giving the latter clearance over a theatre about to be built, largely on the ground that this was commonly done in the industry. A similar result occurred in Gary, Indiana, when an exhibitor——

Judge Hand: That was Judge Chesnut's case?

Mr. Marcus: That is right, the Westway case.

A similar result occurred in Gary, Indiana, when an exhibitor there complained of his subordination to the Chicago clearances of the affiliated theatre. In the consent decree there is the statement that "it is recognized that clearance, reasonable as to time and area, is essential in the distribution and exhibition of motion pictures."

That statement admittedly permitted the arbitrators who heard individual clearance complaints to accept the same basic assumptions as to clearances in making their awards that the District Courts had made in hearing treble damage complaints but it did not adjudicate the validity of clearance as such.

And it is a commentary upon the ineffectiveness of the criteria of the consent decree to bring this system outside of the Sherman Act, that the arbitrators and the Appeal Board deem it necessary to apply clearances in proportion to the degree of competition in a particular situation.

As Mr. Keough testified, clearance is a euphemism for the term protection which was used prior to NRA. Protection, of course, is a more apt description of this system since it is admittedly used primarily to protect some exhibitor—according to the defendants, the one with the bigger and better theatre, against the competition of another exhibitor. This sort of protection we submit is illegal under the Interstate Circuit and Ethyl cases.

Grave doubt is cast upon a claim of essentiality of clearance by the use of day and date booking, extended runs, move-overs, and basing runs upon admission prices. We may note that Mr. Montague's recognition of clearance as a weed in the garden of distribution is hardly compatible

with a recognition of its essentiality. An argument of necessity of time intervals—and I believe this was the point you were raising, Judge Bright—an argument of necessity of time intervals between runs is not an argument for clearance restrictions. As the Supreme Court said in the Sugar Institute case, 297 U.S. 553,585, with respect to the contention of the defendants that it was necessary in that industry to announce price changes before sales,—and I quote——

> "Defendants' argument on this point is a forcible one, but we need not follow it through in detail. For the question, as we have seen, is not really with respect to the practice of making price announcements in advance of sales, but as to defendants' requirements of adherence to such announcements without the deviations which open and fair competition might require or justify."

In the Ethyl, Univis Lens and Hartford-Empire cases the Supreme Court struck down an entire system of restrictive licensing despite the fact that there were aspects of that restrictive licensing system which might have stood up alone.

Under the doctrine of those cases another ground for doing away with the clearance system is its very extensive misuse to restrain competition. As is noted by the trial courts in the Crescent and Schine cases, clearances were given to circuit operators where none had existed before, exhibitors in one town who had clearance over theatres in another town found this situation reversed when a circuit acquired the latter theatre.

Judge Goddard: How many instances of that are there in the record?

Mr. Marcus: There are many instances in the findings of fact in the Crescent case, your Honor, and in the Schine case.

Judge Goddard: How about here in this record, this case?

Mr. Marcus on behalf of Government

Mr. Marcus: Well, we take it, your Honor, that your Honor is entitled and should, with respect to the national scope of these various practices, to look at the decisions of other courts involving these practices.

Judge Goddard: Yes, I agree with you, but you made a statement, and I was interested to know how it was supported by the facts. How many instances are there of clearances changed when it was taken over by an affiliate?

Mr. Marcus: If your Honor would like, I should be glad to collate the number and the specific instances as found in the findings of fact in the Crescent case——

Judge Goddard: No, I am talking about this case.

Mr. Marcus: In this case, your Honor, we did not attempt to introduce evidence with respect to individual situations.

Judge Goddard: I think there was some point made of that in the Government's brief, and I think the various defendants have supplied that information and there are very few.

Mr. Marcus: Your Honor, the arbitration decisions themselves point to that.

Mr. Proskauer: How many?

Judge Goddard: That is a little different situation. The arbitrators passed upon, as I understand it the length of clearance.

Mr. Marcus: Well, there is at least one decision which we offered in evidence which I recall, in which the arbitrators noted that—I think it was in Chicago—there had been a certain clearance, and then it had been increased.

Judge Goddard: That may have been, but I think there are very few. If there are more, I should be interested to know it. I think there are very few.

Mr. Marcus: Well, we could attempt to look through the arbitration decisions to ascertain that, but I say that on that question your Honors are clearly entitled to and should look at the Crescent and Schine cases.

Clearances inordinate in time and area were abundantly bestowed on favored circuits. We have set out at pages 78 to 85 of our brief instances——

Judge Bright: Which pages did you say?

Mr. Marcus: 78 to 85.

Judge Bright: Are these pages in your new brief or the old brief?

Mr. Marcus: The old brief. We have set out at these pages instances of clearances so long in time and area as on their face to be grossly restrictive of competition. The defendants have responded in their briefs by citing still other similar instances from the record in this case. Clearance has been a major device to promote and maintain affiliated theatre operation dominant in local areas. The arbitration decisions illustrate other instances of the misuse of clearance.

We say flatly that the primary basis of the clearance system is to protect favored exhibitors from competition without regard to respective revenue possibilities of one theatre as compared with another. The common form of clearance is one given to a theatre or theatres over a town, over specific towns, or over a geographical area and not over other specified theatres. Universal currently insures the Skouras circuit from competition by expressly giving it clearance over new theatres, and Loew has similarly protected its theatres in Metropolitan New York.

The defendants have long abandoned any attempt to determine under any public interest criteria the reasonableness of any particular clearance. For the most part, they take a clearance as they find it, as stated by Mr. Montague, except when persuaded by a circuit to grant a clearance detrimental to a smaller competitor or when forced by court or arbitration action to reduce a particular clearance. To illustrate, I should like to read a clearance Fox was giving an exhibitor in Chester, Pennsylvania, in the 1943-44 season. This is the clearance:

"The only run for features and shorts, excepting News, the Exhibitor is entitled to pursuant to this contract is first run Chester, Pennsylvania, with the usual protection and clearance granted to first run exhibitors in said City. Such clearance or protection, however, shall be subject to any change or modification made by any Local Clearance and Zoning Board having jurisdiction thereof in accordance with the 'Code of Fair Competition for the Motion Picture Industry' as approved on November 27, 1933 by President Roosevelt."

Mr. Caskey: What is that?

Mr. Raftery: What exhibit is that?

Mr. Marcus: 42.

We submit that clearance restrictions should be held invalid both because of their basic illegality and their extensive misuse.

Judge Bright: Do I understand you that any clearance provision in any contract is a violation of the Sherman Act?

Mr. Marcus: We take that position in the context of this industry, yes.

Judge Bright: By an individual or a group?

Mr. Marcus: That is right, and your Honor must not forget that when we talk about clearance agreements, we are not talking about a clearance agreement between Loew's and some specific exhibitor in New York; we are talking about clearances by Loew with exhibitors all over the country, setting up a restrictive time interval system.

I shall turn now to the question of block booking and blind selling. Of the defendants, only Columbia and Universal are presently selling or licensing pictures in large blocks without previous trade showings. The other defendants have been able, according to the testimony in this case, to get along well under a contrary system and we hardly think these two defendants can in good faith assert inability to do likewise.

Since there has been no adjudication against any of these defendants of the illegality of this system of distribution, the problem is significant with respect to all of them. The effect of this system, of course, is to compel many exhibitors to take most or none of the pictures licensed. We submit that this is the sort of tying agreement condemned in a long line of cases. Its use as a means of mutual enforcement of the value of different copyrights is clearly improper under the Ethyl case, where the Court held that the monopoly power or one patent could not be used to expand the monopoly power of another patent. By itself, the monopoly power of a particular copyrighted picture may be slight, depending upon its drawing power. If its value is slight, it has scant chance of monopolizing the playing time or the more profitable part of the playing time of any exhibitor. But when it and others like it become the tail to the kite of the more desirable pictures, we have the kind of situation the Court in the Ethyl case condemned.

It is a device, as shown in the Schine and Crescent cases, readily susceptible to use as a means of promoting a favored circuit monopoly of exhibitions. Its use compels an exhibitor to take the bad with the good, to the detriment of the movie-going public. When coupled with, as it is, minimum admission price restrictions, it becomes a device to control admission prices through the group strength of many copyrights.

For all of these reasons, it is submitted that block booking and blind selling should be held invalid. We believe that the——

Judge Hand: What about the provision in the consent decree about the limited number?

Mr. Marcus: Five? Well.——

Judge Hand: Is that too many? Is everything too many above one?

Mr. Marcus: That provision, your Honor, has expired.

The Court: No, no, no. I am not talking about whether it has expired or has not expired. I am talking about your doctrine.

Mr. Marcus on behalf of Government

Mr. Marcus: I think, your Honor, whether or not selling five pictures together might be a violation of the Sherman Act does not reflect upon whether selling an entire season's product is invalid under the Sherman Act. There are——

Judge Hand: Very likely it does not. I merely asked you another question. If you cannot answer it, all right. I don't blame you. This is a very confused subject. You ought not to be as much confused as I generally am.

Mr. Marcus: Your Honor, I do not think that question can be answered without seeing how selling in blocks of five is used in this industry to control competition. I should say that as far as selling a season's product, on this basis it clearly does control and restrict competition unreasonably.

We believe that the Famous-Lasky case——

Judge Hand: Apparently they conceded that a great many of them did, or, at least, Judge Goddard held that and signed the consent decree to that effect.

Mr. Marcus: The consent decree expressly states nothing in it shall be construed as a finding.

Judge Hand: Oh, yes, that's right. It is interlocutory.

Mr. Proskauer: None of us is selling a season's product anymore—none of the five.

Mr. Marcus: Well, some of the defendant distributors are selling in blocks larger than five. Loew has sold, on several occasions, blocks larger than five.

We believe that the Famous-Lasky case in 57 Fed. (2d) 152 went off on the ground that, under the circumstances of that case, block booking was not conducive of a monopoly by the defendant. We think, moreover, that its language with respect to tying agreements is not supported by later Supreme Court cases.

In closing, we may point out to the Court that the scope and persistence of restrictive licensing has brought about a condition where both distributors and exhibitors bargain more over the value of a restriction than over the value of a copyrighted film.

We submit to the Court that judgment in this case, to be effective must include provisions enjoining all of these de-

fendant distributors from employing restrictive trade practices, in addition to the divestiture of the producer exhibitor combinations.

Judge Hand: We will adjourn now until 2.15.

(Recess to 2.15 p.m.)

AFTERNOON SESSION

ARGUMENT ON BEHALF OF DEFENDANT LOEW'S

Mr. Davis: If the Court please, I open on behalf of the defendant Loew's, Inc.

No doubt some of the things which I have to say will be of common interest to all of the defendants in the case just as in our briefs. Your Honors have observed that we have undertaken to file two briefs on behalf of all the defendants, one of them dealing with the Consent Decree and the arbitrations under it, the other dealing with certain general principles which we think are applicable throughout; and in addition each one of us have filed a brief in which we undertake to expound our position as we see it vis-a-vis the proof in the case.

The arguments to which we have listened this morning from my brothers Wright and Marcus have left me in some doubt as to the exact scope and course of the argument which I thought necessary to be made. I am disposed to discard no little amount of detail which I expected to invite the Court's attention to and devote myself rather to the general principles of law which seem to us to be decisive.

It must be clear to your Honors that this is quite a unique case in the history of cases under the Sherman law. It is the most ambitions antitrust case so far as I know that has ever been presented to any court—ambitious because it has as its confessed purpose the complete readjustment and

change of the economic structure of an entire industry. In so far as I know no case has ever come forward with any such ambitious scope as that. It is unique because I think it may fairly be said that it is the most amorphous antitrust case ever presented. It is a case in which the lines of definition of the complaint are more indistinct that in any other case that I can recall and in which the logical connection between the facts in evidence and the ultimate conclusion the Government seeks to draw is more vague and imperfect. It is unique I think among antitrust cases because it is the most profoundly critical antitrust case that I can remember.

The complaint as it emerges from the briefs and arguments of Government's counsel is with utter frankness addressed to the industry as a whole represented in the person of these eight defendants and addressed to the entire body of practice which that industry has built up. I did not realize until I listened to my learned friends how many things could be wrong with a single industry.

Some of these companies, perhaps not all, choose to conduct their activities in a corporate form, having a parent corporation, and instead of mere departmental divisions, subsidiary corporations wholly owned through which they conduct their consolidated corporate enterprise. That is a very familiar phenomenon resorted to for many reasons, convenience, and of bookkeeping, and where the corporation is indulging in the ownership of real estate is extremely common, so that the legal title may be vested in an owner of residence in the same state in which the reality is situated for reasons of local legislation and of local taxation.

Now, that we are told is all wrong. That we are solemnly told by counsel for the Government is a combination, a conspiracy between the parent corporation and its subsidiaries which is obnoxious to the Sherman law. They may abandon these hundred per cent subsidiaries; they may draw back all the titles into the body of the parent, that is all right. We are solemnly told that now to conduct a corporate enter-

prise through a parent corporation with corporate subsidiaries is obnoxious to the Sherman law as a combination between them.

We are told again that integration is an offense per se; that it is no longer legal for the manufacturer to pursue his product all the way from the raw material to the manufacture, to the distribution, to the sale at wholesale or retail through facilities of his own creation into the hands of the ultimate consumer. Therefore any such integration as appears with each one of these defendants, except the pretermitted three, that integration is in itself an offense against the Sherman law.

We are told that it is an offense for independent manufacturers to sell or license their product to others who are engaged in the same business, and that whenever these corporations license their films one to another, that thereby there is a combination in restraint of trade, and that that practice ought to be abandoned.

Now, I observed that when the question was bluntly put to Government counsel, "Do you maintain that these defendants should exhibit their films in their own theatres but should not license them for exhibition in the theatre of any other?"—I observed that counsel approached the answer to that question with great temerity, and well he might. For how it can be made an offense under the Sherman law for the owner of property to sell it to somebody else simply because that other person is in the same business, staggers one's legal imagination. But that is wrong.

They say that the fixation of admission prices in a license contract is a fixation of prices such as denounced by the Trenton Potteries and other cases, and that is wrong.

They say that the system of runs is wrong because, instead of negotiating with the licensee for the exhibition at a fixed time and place, these companies ought to put their films on the auction block and on such a day have an Irish come-all-ye and invite all prospective users to submit competitive bids and, therefore, that the system of runs is wrong.

They say the system of clearance is wrong, and I was both interested and relieved to have counsel for the Government make a direct answer as to the Government's position on that question because up to this time there has been some hesitation about that—there is some hesitation about that in the Government's brief. In the Government's brief they intimate that they thought at one time it was right, when the consent decree was entered, but that perhaps in the light of further knowledge they may then have been wrong. Not an admission that they were wrong but a concession of that possibility. This morning my brother Wright has answered affirmatively that all clearance in any contract by a single distributor is per se restraint of trade in a violation of the Sherman law.

We are told that cross-licensing is wrong and, by cross-licensing, and I am repeating myself for a moment, the licensing of films by one to another. When that criticism first appeared it was a criticism of cross-licensing. Then counsel for the Government invented a newer, and in their opinion no doubt a better phrase, diagonal license, whatever that may mean. And now this morning the same topic has appeared under the title of cross use of each other's theatres.

I remember in Alice in Wonderland Humpty-Dumpty says, "When I use a word, it means just what I want it to mean." And Alice says, "Well, how can you make one word mean so many different things?" And Humpty-Dumpty says; "Well, it means what I want it to mean. The only question is, who is to be master?"

I don't know what mastery the Government gets out of cross-licensing, diagonal licensing, cross use. Simply means that they are selling one to the other the commodity that they respectively own. But that is wrong.

Then we thought that the system of arbitration affirmatively commended in the Government's brief, for in its brief the Government speaks of it in terms that narrowly approach eulogy; it commends the impartiality of the arbitra-

tors; commends the diligence with which they have discharged their task, yet admits that some beneficial results have been achieved; and one might think that on the whole the system of arbitration was to go unscathed of criticism here, especially so when your Honors recall that that system of arbitration was not invented by the defendants in this case to avoid divorcement of their theatres, as my brother Wright intimated this morning, as a means of escaping on our part from a worser fate. It was prayed for by the Government in its amended and supplemental complaint. It prayed that the Court might set up just such a system of arbitration as it did. There was finally issued the court decree on the prayer of the Government and the assent of the defendants. And it is a little disappointing to have the Government say this morning that the arbitration system is bad and probably exceeded the power of the court at the time it was created and decreed.

Now, that is a rather sweeping indictment, not only of these defendants, but of an entire industry, and I repeat that I do not recall in any previous antitrust proceeding so general, so sweeping, so ambitious an effort to recreate—the language of my learned friend—to recreate the entire economic structure of one of the principal industries in this country.

I can conceive of that sort of an argument being addressed to a congressional committee by some hot reformer. I suppose within the limits of the Constitution there are things that the Congress can decree. I am not as certain about the limits of its power as I once was and I would be slow to say that Congress might not do some things which are along the line that my brother Wright suggests. But this is a court of justice where we are proceeding upon a charge made, a defense interposed, and proof taken, and we may have what theories we please about what is economically sound and unsound and what commercially is wise and unwise, but the whole question is what is the charge and what is the proof?

Mr. Davis on behalf of Defendant Loew's

Now my brother Wright was kind enough to state on our behalf certain positions which he conceived that we had taken. I made a note of them at the time.

He suggests that our position is that what we have done, if done under sound business judgment, is thereby vindicated face to face with the Sherman law. He suggests that we hold that the consent decree is an immunity cloak to us against any violations of the Sherman law. I was particularly interested in the Government's brief to read on page 5—and I read it for the purpose of comment only—after stating certain principles of law about which there can be no great dispute he endeavors to put us in the wrong from the beginning by saying, "The legal propositions relied upon by the defendants may be roughly stated as converse of the foregoing propositions"—which would mean the converse of everything that has been decided under the Sherman Act with perhaps the following addition—"a use of competitive restraint by any business organization or combination of business organizations which enhances their ability to serve the public by increasing their financial strength and stability may justify a court in approving such restraints as reasonable even though they would otherwise be regarded as unreasonable and therefore violative of the Act."

In other words, proof that a certain practice or a contract or a combination or a conspiracy improves the financial strength and stability of the participants is according to what my brother Wright ascribes to us a defense against a violation of the Sherman law.

Now I shan't claim for myself or my colleagues here at the table any profound legal learning. We are all in our modest way trying to do what we can to help our clients, simple country boys, if you choose, trying to make a living. But there isn't any man at this table so foolish as to assert any of the propositions which my brother Wright has ascribed to us, and I must put that away as beyond contemplation.

He ascribes to us the proposition that habitual use of an illegal practice may come to sanction it,—sort of a statute of limitations or estoppel by time against the Government.

Let me state our conception of the law of this case. There is no dispute about it, there can be no dispute about it for so far as I know there isn't a legal principle necessary for the decision of this case that has the slightest novelty or which is not so axiomatic that it needs no citation for its support.

Eight corporations, wholly diverse and separate, as shown by the record, without any organizational contact, without any common ownership, without any common management, are called into court under what charge? Read the amended complaint. First that they are parties to a combination and conspiracy in restraint of trade, violation of Section 1 of the Sherman law; and second, that they are parties to a monopoly, to an attempt to monopolize, and to a conspiracy to monopolize in violation of Section 2 of the Sherman law.

Now those are the things we are charged with.

The gravamen of the offense under Section 1 of the Sherman law is a partnership in crime, some form of deliberately concerted action, some contract, combination or conspiracy, some agreement shown between the persons accused to effect the restraint complained of. Lacking proof of such an agreement the charge absolutely fails.

Throughout my brother Wright's brief there runs the word "collectively", a recognition on the part of the Government that collective and concerted action was necessary to support their complaint.

And if you take away that one word "collectively" from the Government's brief, there is nothing left of any substance whatever.

Now of course the existence or non-existence of such a conspiracy can be shown either by direct evidence, by such a written contract as my friend alludes to, or by some of the inter-office correspondence on which prosecutors under the Sherman Law have advantaged for so long—to such an extent, indeed, that some people have said that what American

business needed is more illiterate business men. But it may be so proven. It may be proven as well by circumstances like any other fact. But if the proof is circumstantial, it must be something more than raise a mere suspicion. It must be inconsistent with innocence and consistent only with guilt; for this is a highly penal statute; and whether the Government is proceeding on the criminal or the civil side of the court, presumption of innocence attends the defendants throughout, and the burden of rebutting that presumption is and must remain upon the Government. And where the effort is to prove a combination or conspiracy by circumstances, mere uniformity or similarity in matters lawful in themselves, and least of all the type of well established and recognized trade practices common to the industry as a whole, does not raise an inference of a combination or conspiracy in violation of the Act. And, of course, where the combination or conspiracy is shown, there must be some unreasonable restraint.

Now we do not press that doctrine as far as my friend thinks we do. We do not say that reasonableness or unreasonableness is to be determined by the profitable or unprofitable character of the restraint resorted to, but there must be some showing of public injury which renders the restraint unreasonable. For concerted action may as well be innocent as wicked, and what the Act is primarily aimed at is destruction of competition in trade to the injury of the public.

Of course there are many cases, some of which my friends have alluded to, where certain practices manifestly injurious have been denounced. Price fixing; we agree that is bad. Concerted curtailment of production; we agree that is bad. Division of markets; we agree that is bad. The destruction or exclusion of competitors deliberately resorted to are already recognized as ways to the forbidden end. And I challenge my friends for the Government in all this mass of documents to point to one single document that utilizes any of those forbidden means.

Section 2 of the Sherman law under which we are also called to answer, forbids any monopolizing, attempts to monopolize or conspiracy or combination to monopolize.

Now it has been recognized by all the decisions that there is some overlap betwen the field of the first and second sections of the Sherman law. The most apparent perhaps is that monopoly is ordinarily the end of which the restraint of trade is the mere means. But when the Government charged a combination or conspiracy to monopolize, it must prove it in the same fashion as they proceed to prove a combination or conspiracy under Section 1. And I call attention to a distinction, a distinction which in some aspects of this case has not been observed or commented on, between the use of the word "monopoly" as a term in law, and the use of the term "monopoly" in its vulgar and common employment. Commonly employed, it is frequently used as a synonym for solitude; but monopoly in law is not solitude alone. It is the intent and the power and the purpose to exclude others.

A man who has the only theatre in a city or a town or a village is no monopolist. The only manufacturer producing certain commodities is not, *per se*, a monopolist, even though they both stand alone in their respective fields. But have they the power and the desire and the purpose to exclude others from entering that field? Or have they achieved that solitude by the destruction of others who stood in their path? That is monopoly in the legal sense.

Now of course it is highly competent, when you are investigating a monopoly, to consider the share of the total trade which the monopolist has absorbed to himself; but it is his share of the total that is important; it is his proportion of the field that he has grossed that is critical. What others may have, his rivals, cannot be added to his in order to build up a wholly fictitious picture of engrossment, which is exactly what our friends have attempted here. Monopoly cannot be built up by mere mathematical addition. One and one make two, and two and two make four, and under certain circumstances that is a highly interesting mathematical phenomenon. But you cant' take my business and add it it to the business of a half dozen rivals and say that as a

group we have 70, 80, 90 per cent of all the business done, and call us a monopoly.

So that when in the Government's brief and in argument they allude to the fact that these five culprits collectively or as a group produce 70 per cent of the pictures produced, or more perhaps; 70 per cent of the revenue derived, and, ergo, they have achieved a monopoly, that is not enough unless then can prove that we have shared a common purpose, pursued a common end, and reached it by concerted action.

I challenge my friend to point to anything in this record that will support that proposition. I challenge any showing of a financial interest; any proof of a combination or conspiracy; and in its absence, all this multiplicity of what I might call adding machine testimony, has no significance in this case whatever. You might as well have filed the Dow Jones report of averages so far as illuminating this controversy.

Now, so much for the Sherman law. I hope I have made the position of the defendants here too plain to be susceptible of misrepresentation or of misunderstanding; and if that is not the law of the Sherman Act, if that is not what can be distilled from all of the decisions, then I confess my inability. And I do not find in the Interstate case and the Crescent case and the Schine case and the Bigelow case, and the Goldman case, and these other cases on which my friends so constantly rely—I do not find any doctrine different from that at all.

Let us talk about copyrights. Of course the monopoly of a copyright is one created by law. It is a designed and purposeful legal monopoly, and like patents, believed to be created under the Constitution in the public interest. It gives to the owner of a copyrighted book, picture, drama, or musical composition, the right to exclude all others from using, selling, reproducing, exhibiting or imitating without his consent. Except for that right to exclude it does not, as I understand the copyright law, enlarge the rights which are already inherent in the owner of a copyrighted article.

Mr. Davis on behalf of Defendant Loew's

I have not, like some of my learned friends here, written any books on the subject that can be quoted either for or against me, but that is my conception of the Copyright Law, and any author is at liberty to criticise me. All the Copyright Law does, is not to enlarge those rights which are inherent in an owner by virtue of his act of creation, but to protect those rights from invasion by others. He may exact for his consent to such an invasion a price fixed between himself and the licensee by any measurement he chooses. I lay that down as fundamental. It is part of the right of an owner. Of course, he cannot lay down as a measurement the number of murders committed, but any measurement not contrary to public policy is within his absolute right to adopt. It may be a flat price in dollars. That is within his rights. If it is a per diem picture he may charge so much per diem for each day of its exhibition, utterly regardless of the box office receipts. If it is shown at a theatre, if he chooses to, he can charge so much per capita for every person who passes the ticket window regardless of the price of the tickets. He can even count the traditional and familiar red-headed persons who pass in or out and charge so much per auburn-haired person. I don't like to leave the red-headed person out because we never do in stating a summary of this kind. It may be a percentage of either the gross or the net receipts on that particular exhibition, or his measure may be a percentage of the over-all income of the licensee. And if it is either of the latter, the copyright owner, when he names his percentage, and in order to protect his anticipated revenue and return, may inquire of the theatre owner what are his minimum admission prices out of which receipts are to grow, and may agree with the theatre owner as a part of this contract of license that during the life of the exhibition, such prices shall be maintained.

Now, that is what these people have done. They have repeatedly said in their license contracts, during the exhibition of the licensed article we shall receive such a percentage, and that we may know in advance what we can expect to receive and may be protected in having that ex-

pectation realized, you shall charge not less, during this exhibition, than the prices you are charging at your theatre.

Judge Hand: The Government, as I understand it, says that irrespective of combination, irrespective of anything, if that was done by a single man, it would violate the Sherman Act. You understand that, don't you?

Mr. Davis: I understood the Government to say that, and I don't mind saying, your Honor, that I gasped as I heard it.

The Court: Well, they did not get that far before, and they have evidently had a conversion, and the thing has been progressive. As Herr Klein said, "Nothing ever is. Everything becomes."

Mr. Davis: I am not sure that I would call the Government's attitude conversion. *Facilis descensus averni.* Since having started down this slope, they do not know just where to put their feet and stop.

Judge Hand: I was having a bit of a controversy with my brother-in-law as to whether it shouldn't be Averni, and he has gone back to the 14th Century and found statements in which it was Averno then.

Mr. Davis: All I have to say to your Honor, in your defense and mine, is that there was some terribly bad Latin put out in the medieval years.

On the copyright factor of this thing, the copyright aspect, enters in just here: I repeat that the owner has a perfect right to measure his compensation by any measurement he chooses to adopt, that is not in violation of public policy. We all know there are certain contracts that per se violate public policy and cannot be entered into, restraint of marriage, contracts of felony and whatever, but as long as he stays out of those recognized limits, he is the master of his own measurement.

These contracts have this peculiarity. Under these contracts the motion picture producer remains at all times the owner of the copyrighted article and of the rolls of film by which it is to be reproduced. That he never parts with. The relations between him and the exhibitor are those of licensor and licensee, so far as the copyright article is concerned, and bailor and bailee, for use so far as the films are concerned.

The naming of the admission price to the theatre is not fixing a price for resale of the article. This occurs where a copyrighted book, for instance, is sold outright for a named price to the book seller and freed to the channels of trade. There the original copyright owner has parted with all interest in the article, he has received his reward, it has entered the channels of trade, and his dominion over it and the price to be received for it is entirely gone. That is the Bobbs-Merrill case. In this case the copyrighted article never enters the channels of trade and the owner never parts with its dominion.

It may be admitted that where the copyrighted article is sold outright a resale price fixed by the original vendor who has parted with it cannot be imposed. But where the vendor or the licensor retains the full license and control and merely permits a showing for a return upon compensatory terms it is entirely different. It is quite like the case where the owner of real estate leases his building for a specified time and specified use and takes by way of rental certain percentage of the rents which his tenant collects for the use of the building, with a covenant that no leases shall be made at less than so much per square foot. There is no price fixing about that except that he gets his revenue out of the profits earned on the use of the leased or licensed article.

Well, let's come to integration. The Government tells us that the integrated structure of this industry—and this really is its principal complaint; indeed the Government's brief opens with the—shall I say somewhat confident statement that the only thing the Court need be concerned with here is relief—and when I saw all these exhibits going in I thought that was probably true—but it must be assumed from the Government's brief that the offense has been proven, guilt has been established and that the defendants here are on their hands and knees awaiting the final sentence, and that all that is important here is relief and all the relief that is important is to divorce these people from their theatres.

Mr. Davis on behalf of Defendant Loew's

May I say in passing before I go down to a little further disquisition on the law that I wonder if the magnitude of that operation has ever occurred to the learned counsel for the Government. My client has theatres of a book value of—I am not sure about the figures—$60,000,000—of that order. My friends have clients who are equally fortunate in the possession of considerable amount of real estate. There are some—what is it?—4000 or 4500 affiliated theatres. Well, whatever it is—several thousand theatres owned by these corporations, of superior character most of them, so much so that I think nobody who listens to this testimony here would dispute, the largest, the best theatres in the country; and the Court is to order them to be sold, they are to be divorced. I supposed sold. Certainly the Court is not going to order them to be burned even in the pursuit of so righteous a purpose as the vindication of the Sherman law. Sold to whom? Are they to be sold theatre by theatre and town by town? Are they to be closed until some local speculator comes and is willing to take it over?

I have assumed that the Government would recoil from the idea of having them sold in large blocks to any syndicated operation for fear that they might be building up a worse monopoly than the one they have successfully destroyed. Who is to buy them? When are they to be sold? How long must they be closed before a prospective purchaser appeared? What is to happen to the industry in the meantime? Who is to rent them? Who is to exhibit in them? I wonder as a practical matter—and I assume we all claim to be practical men whether we are or not—I wonder whether the learned counsel for the Government have appreciated the magnitude of the surgical operation for which they are so loudly clamoring.

Now I take it that the common law right—I go back to the law—of any manufacturer, I care not in what line it may be—to follow his article all the way from the assembling of the raw material through the intervening stages of manufacture, distribution and sale, whether wholesale or retail, whether under the roofs of another or under his own, to the

hand of the ultimate consumer has not been denied at any time. And for myself, again with my reservations as to the present limitations of the Constitution, I do not think it to be constitutionally deniable. I can imagine no statute that would cut off that right without interfering with the Fifth Amendment if it still survives.

Now the fact that a successful integration may give the integrated enterprise an economic advantage over rivals who have not chosen to follow a similar course—and that is the gravamen of the Government's complaint—is nothing to its discredit in law or in morals. The free competition which the Sherman law was enacted to preserve contemplates exactly that result. Competition means the struggle of one to obtain what another equally desires. It is intended by the underlying logic of the Sherman law that the battle shall be to the strong and the race shall be to the swift, and success is not penalized by it. Nor are men robbed by it by the methods and means to obtain that success, and it does not seek to bring about a dead level of economic or financial equality. If these defendants find it to their profit to produce, to distribute and to exhibit in their own theatres—a phrase which popped up earlier in this case—at exorbitant profits, that is a matter of the most entire inconsequence so far as the Sherman law is concerned. I think we have shown that our profits are not exorbitant. I think all of us will admit that we wish they were more. But whether more or less is a matter of entire inconsequence here.

Now so much for integration. That is our position about it, and we challenge the Government to put in its surgical knife at the point it wants and dismember the living body of this industry.

I want to say something about uniform trade practices. It was ascribed to us by my brother Wright this morning the conception that practices long continued acquired a certain measure of sanction and that we rely upon the habits of the industry for our defense. I repudiate that suggestion. A practice which of itself is a violation of law does not get any

better by repetition. In fact, the burden of guilt may only pile a little higher. But uniform trade practices without more—without more, I repeat, are no proof whatever of conspiracy or combination. Every line of business of which I have any knowledge evolves certain methods peculiar to itself by which it may be most profitably carried on. I know of no exception; not even the law. They evolve, as has been the case here, a glossary of terms peculiar to themselves. And where a certain practice initiated by one proves useful it is sure to find imitators, and these may appear in such numbers as to make the practice universal. That is a very, very common phenomenon. In this industry such are the practices of runs, clearances, percentage contracts; minimum admission prices, and such too is the general over-all similarity—not identity, but similarity of licensing contracts, similarity which in certain businesses like insurance is compelled by law.

One other point which I emphasized in opening the case and desire to emphasize at its close in view of some remark by my brother Marcus in which he asserted that the Court would take cognizance of violations instanced by the Interstate Circuit, Crescent, the Schine, the Goldman and other cases, and of the arbiter awards. I wish to emphasize again that absent proof of conspiracy, isolated cases, especially where they have been adjudicated and remedy has been applied, contracts, instances are inadmissible absent conspiracy against third persons not parties to the particular transaction. I insist upon that now, I insisted upon it in opening, and I wish my client be judged only by so much of the proof as is addressed to its alleged misconduct.

I am trying, your Honors, to ration myself.

(To Mr. Proskauer): Are you getting impatient?

Mr. Proskauer: Never when I listen to you.

Mr. Davis: Thank you. That is very handsome.

Well, I shall hurry.

Now, tested by these legal principles—and I offer them for criticism or dispute—tested by what I claim to be these

thoroughly tested legal principles, axiomatic in character, how does my particular client stand here?

We began the case with a charge of a monopoly of production. In the light of the proof of the manner in which production was carried on, and the freedom to whomsoever willed to enter into that particular activity, the Government withdrew that charge and admitted that it no longer charged any effort to monopolize the production of motion picture features.

We were left with distribution and exhibition. How does my defendant Loew stand on the question of distribution? Have we monopolized it? Have we restrained it? We produced 33 features last year and six specials. We distributed them freely over the country. We showed them in roughly all of the theatres of the country. We sold them under license contracts which contained the features which are now complained of; and if those features were illegal, we as to each individual contract restrained trade.

The testimony of Mr. Rodgers was that in one season we made about 180,000 such contracts—or maybe it was in less than a season, I am not sure—and if guilty, let it be said we were guilty that year 180,000 times, which would seem to be a burden of guilt enough to sink any defense.

Now, what did we do that was wrong? That is what we want to know.

Said my friend he would favor selling these films competitively. That is to say, at public auction. Is it conceivable that this industry could do that? Here are 18,076 theatres in the United States. They make an average of 300 to 350 films of each feature which rotate in sequence the country over. Could they produce if they wanted to 18,076 films, rolls, reels, at one time, and send them the country over to every theatre? In the first place, it would be folly, and in the second place it would be an economic impossibility. There is not a company, no matter how prosperous, in the business that could possibly do it. If that be true, they have got to be shown somewhere, some place before they are

shown somewhere else. You can't perform on these films the miracle of the loaves and fishes and have 300 films simultaneously serve 18,076 theatres. And if you have got to show them some place before you show them elsewhere, obviously you have got to select those places, and you have got to negotiate with the proprietor of those theatres the terms on which he shall have this privilege of exhibition.

Now, we put on the stand the witness Rodgers, and Loew's Exhibit L-13, a list of all the first-run theatres in the critical 92 cities. He gave the reasons why he showed his films first run in this theatre and that and every one of them. 36 of them were cities in which Loew itself had the first run. The others were divided between affiliated and independent theatres. The evidence shows that in some cases where there were affiliated theatres he showed first runs in independents, and vice versa. He gave clearance.

Now, it amazes me that anybody should misunderstand the legal foundation of clearance. I do not think it draws wholly from the Copyright Law. I think it is a sample—not just the word I want—an incident of the oldest form of commercial restraint that the books contain, which neither the Sherman Law nor any other law has ever denounced. It is elementary; it is Hornbook law that the vendor selling a piece of property in order to protect the thing his vendee has bought may disable himself for a reasonable time and in a reasonable area from competing himself or putting anybody else in competition with him. I sell a grocery store and I contract with my vendee that I won't go into the grocery business in that town for a certain period of time. The oldest form of restraint that I can remember in the commercial law, bad only—bad only when it is unlimited in space and unlimited in time.

Now, what do they do? They license a theatre for compensation from the exhibitor at a certain place, at a certain time for a certain duration, and they say to the person who has purchased that privilege, "We will protect you"—I like the word "protection" better than I do "clearance" myself; I do not shrink from it at all—they say to their licensee,

"We will protect you the enjoyment of this privilege by not putting any person in competition with you for a specified time in a specified area." I do not care whether it is a copyright or what it is; it is a familiar example of a familiar process sanctioned by every court that ever sat in the Anglo-Saxon world, and, so far as I know, it may be wider than that. Under every system of law of which I have any knowledge, it has always been held dishonorable to sell property with one hand and destroy its value with the other. That is what clearance is, and that is all it is.

Now, because clearance created a great deal of ill feeling among exhibitors, jealousy and malice being human passions which, unfortunately, have not yet been exercised, and because some were envious of another, a great deal of controversy arose about it. We said to the Court, "Relieve us of the burden of this controversy; give these people a cheap and inexpensive form in which they may give vent to whatever injury they think they may have;" and the Court set up the arbitration machinery accordingly, not to relieve us from the danger of divorce, not to exempt us from the command of the Sherman law, but to bring about, as far as the Court on its side and we on ours could do, a condition of peace and prompt remedy in the industry.

Now, we have used clearance; we still use clearance, and if that be treason or guilt under the Sherman Law, then counsel for the Government must make the most of it.

We have used minimum admission prices. I have already referred to that and won't repeat it.

We have resorted to percentage contracts as a basis for measuring the return due us for our consent to exhibition. And if that be treason, make the most of it.

What else have we done in distribution? Have we adopted any fixed pattern—that is a favorite word with the Government—have we adopted any fixed pattern of patronage with our co-defendants or they with us? Have we conditioned the licensing of our films in any one theatre upon a contravening promise on their part to license us? Have we favored one over the other? The record is utterly barren of any-

thing of that sort. Indeed—and I am not going to take the time for statistics—it will appear that so far as the alleged conspirators are concerned, we have gotten more money year by year out of the independent exhibitor than we have out of any one of them. And the only way in which our takings from them can be made formidable is by the process of addition, on which the Government relies to establish its monoply.

Let me hurry on. Have we monopolized or restrained exhibition? That is the third branch of the industry. What has Loew's done in that respect? How have we monopolized and how have we restrained? We operate 131 theatres, 64 of them in the City of New York, the others scattered widely over the country, and all those outside of New York I believe are first-run theatres where we exhibit our own films first. We had in 1935 128 theatres; in 1940, I think it was, we had 132. We are now operating in this year of grace 131. So that in that period of time, if monopolizing theatres means reaching out and buying them, we have certainly neglected our opportunities; for in the same period theatres in the United States have multiplied from 13,000 to over 18,000. If we were monopolizing theatres, why, weren't we a part of that Oklahoma rush?

We show our own films first run in our own theatres. 33 films and 6 specials are not enough to keep a first-run theatre going. You can keep grinding them out day after day, but the public, unfortunately, has other notions about it. And after a film has run so long they ask a change of diet, and the wise theatre owner must provide it. We have not enough of our own films to keep our theatres going. I rather gather from an answer my friend made to the Court this morning that his position was that if we showed only our own films in our own theatres, there was not anything wrong about it. I suppose the necessary and logical consequence of that is that when our own films run dry we shall close our theatre until we get another film from the same source.

Judge Hand: Well, he would let you use the independents until you got an unlawful combination of them.

Mr. Davis: I suppose we would go down the same slippery slope if we tried to sell our films with them, but that is pretty nearly what we have done.

If your Honors will turn to Appendix 1 of this brief, talking about monopolies in exhibition——

Judge Bright: Which brief?

Mr. Davis: Loew's individual brief.

Judge Bright: What page?

Mr. Davis: The first appendix. It is on page—well, it is page 51, really. This is the place where we edged up. After we finished our brief, we edged up on the court a little bit in some appendices, not an unfamiliar process.

I just want to indicate the character of that, and I shan't take the Court the whole journey through. That is intended to show, so far from monopolizing exhibition by engrossing the film supply, we show it in these cities where we have first-run theatres, 36 in all, our own film in our own theatre; we show it also in Akron, for instance, 19 films of the United Artists, 16 or half of 16 are Paramount; at the same time, in the same place, independent theatres competing with us were showing Fox, RKO, Warner, Universal, Paramount and Columbia. Curious conduct on the part of members of a conspiracy! A great lack of that consideration for one another which you might expect.

If you will go down every one of these cities, you will find that in no one of them did we absorb the film supply. You will find that in every one of them we had active first-run competitors who were showing the films of our brethren in this fraternal organization.

All I ask the Court to do, in the light of that statement, is to give to the appendices of our brief a moment's consideration.

I have taken, if your Honors please, more time, and under some adverse circumstances, more time than I promised my brethren. It is a fascinating subject and the temptation to verbosity is, indeed, extreme, but I know I am supported by those——

Mr. Proskauer: Of really equal verbosity.

Mr. Davis: Yes, I will admit, who are equally verbose, and therefore I subside.

ARGUMENT ON BEHALF OF DEFENDANT PARAMOUNT

Mr. Seymour: May it please the Court, on behalf of the Paramount defendants, the charges against them are first, that they have followed the general industry practices which Mr. Davis has referred to; second, apparently that they constitute some kind of illegal combination themselves; third, that they are a party to some kind of illegal combination with the other defendants. And then, because they have interests in some theatres in small towns, many of them in the South, it is said that they have local theatre monopolies. And finally, there is a blanket attack in the brief about so-called discriminations, and Paramount is said to practice some of them.

I want first to say just a little more about these industry practices. Mr. Davis has covered them pretty generally but I would just like to add a few words about them and then pass to the particular charge against Paramount.

We have shown in this case that the practice of licensing motion pictures on run and with clearance is old in the industry, not for the purpose of showing that it has been done so long it would be a shame to change it, but for the purpose of showing it dates back before anybody had any interest in theatres—before any producer-distributor had any interest in theatres, and that has been proved beyond any dispute. It is perfectly apparent that from the very beginning of the industry, prior to the time when Paramount, which was the first to acquire an interest in theatres, had any theatres or interest in theatres, pictures were licensed on run and with clearance, and I cannot quite understand how Mr. Wright passes that off by saying that the contracts in evidence which refer to protection or clearance have that provision typewritten in.

Mr. Wright: Have you got them there?

Mr. Seymour on behalf of Defendant Paramount

Mr. Seymour: They are in evidence. They show that they were used in 1917 and 1918, and there is evidence that the other practices, percentage licenses, and specifying a minimum admission price, are very old. Now their antiquity does not give any protection if they are illegal, but they do show that they do not have any relationship to the question of affiliation and therefore they must be judged on their merits.

Furthermore, there isn't any possible dispute on this record that those practices are followed by every distributor in the industry; that all motion pictures are licensed on run and with clearance, most of them or many of them on a percentage, and in almost every case a minimum admission price is fixed, and that applies not only to distributors who are defendants in this case, but to distributors who are not defendants in this case, and that such terms are included in licenses with all exhibitors, whether they are affiliated or independent. Therefore, that whole question of trade practice is utterly unrelated to the question of affiliation or interest in theatres or to the relief which the Government asks.

I will just say a word about each of those practices if I may. As to run, your Honors know from what has been said here today and from the evidence that all distributors make a relatively limited number of prints, due to serve from five to fifteen thousand theatres, which are the customers of those pictures. Prints are expensive. The majority of exhibitors pay rentals on any particular picture which are less than the cost of a single print. Now, not only is it essential to distribute on run from the distributor's point of view in order to get the largest revenue and to make some profit on the increasingly expensive pictures which are being produced, but it also enables the pictures to be exhibited at different times, at different admission prices, so that the most expensive picture produced is eventually available to the public at a nominal admission price, a thing which could not be done without the practice of licensing on successive runs.

Clearance is nothing more than an agreement corollary to an agreement for an exclusive run, assuring the exhibitor

against competition in the immediate area for a limited period of time. It is perfectly plain from the evidence that clearance is stated in all kinds of different ways, depending on local conditions, local past practice and so on. There is no pattern of clearance over the country. And while it is true, as has been suggested, that where distributor A and distributor B deal with exhibitor X, at different times on different pictures, X tends to have the same run and the same clearance, it is perfectly evident in this case that that is the result of individual negotiation and competitive conditions and not a result of agreement between the distributors and, indeed, there is no claim to the contrary.

It is suggested, although it was not emphasized in argument, that somehow this clearance practice is used favorably to affiliated theatres and unfavorably to independent theatres. There is nothing in that at all. Clearance arose before there was any affiliation. The evidence of the clearance terms in this record showing the terms on which the distributors have licensed pictures to both affiliated and independent theatres, shows no pattern of granting longer clearance or more favorable clearance to affiliated theatres than independents. The one thing that is shown is this: it is a universal practice indiscriminately used in dealing with the various exhibitors in various areas, so that any claim of discrimination in clearance is perfectly empty on this record.

What is the purpose both of run and clearance from the exhibitor's point of view? It assures him an exclusive right for a limited time to exhibit the picture on a particular run. It enables him safely to agree to pay the distributor the rental which is the subject matter of the negotiations, and from the exhibitor's point of view, that is the reason he is able to agree to do it because he knows that for a limited time he will be the only exhibitor in the particular area free to exhibit the picture and he won't have to worry about his customers waiting for another theatre, which is going to play right after him, without a period of clearance, and

from the distributor's point of view it is the way he is able to get the largest reward for the license which he makes.

It is suggested, although it was not emphasized on argument, that somehow clearance terms prejudice subsequent runs. I think that was cleared up entirely during the trial. It is perfectly apparent that each theatre knows what the clearance terms are in favor of the prior run theatre. Notices of availability come to the later run, and the later run is able to book its pictures. No possible claim can be made that there is any prejudice; that any theatre has been without pictures.

The Government argues in its brief that there is some kind of control in favor of the earlier run. It is perfectly apparent—that is another way of saying the same thing—it is perfectly apparent that control rests not in the exhibitor but in the distributor who, in order to get the largest possible reward, agrees to these terms with the prior run exhibitor in order to assure payment of the film rental.

It seems a distortion of the relationship to say that there is some kind of control, but whether you choose to view it that way or not, the subsequent run exhibitor is not prejudiced by the system which he has agreed to, and which he gets the benefit of over the later run.

Judge Hand: What is the real claim of prejudice? So far as the subsequent people go, what is the real claim of prejudice in this clearance? It is urged to be one of delay, isn't it?

Mr. Seymour: Everybody——

Judge Hand: Of course, they get it.

Mr. Seymour: Every subsequent run theatre wants less clearance, more over his competitor and less over himself, and that is what the arbitrations have been about.

Mr. Wright: Since it is our claim, may I state it briefly, your Honor.

Judge Hand: Yes.

Mr. Wright: With respect to admission price fixing, it is simply this, that the subsequent run exhibitor has no protection whatsoever of his position by virtue of his contract

that the admission price be fixed, and this record shows that the Paramount partners say they fix their own admission prices, and when one of them who has a prior run over a competing subsequent independent chooses to cut his price down to the same price as the independent and maintain his priority, there is nothing in the subsequent run contract with the distributor that protects him from that kind of unfair competition.

Mr. Seymour: That is a canard which has been completely destroyed in our brief, and it is a distortion. I feel certain that Mr. Wright could not have read the record himself or he would not have said such a thing. He had two witnesses here who testified under my examination, Messrs. Mullin and Friedl, that they determined the admission prices in the theatres that they were operating, and in which Paramount had an interest, and that those were the prices that went into the contracts with distributors, and we had other testimony which clearly esablished that it was a universal practice in this industry for the exhibitor to determine the price. What Mr. Wright is referring to, when referring to Paramount partners, is that they said that they fixed the price that went into the contract, and therefore that they are in a different position than other exhibitors, and that is not so at all.

What does Mr. Wright say in his argument to your Honors ought to be the system as to first run and clearance? If I followed him, what he said is this: run and clearance are illegal if a matter of agreement, even between a single distributor and a single exhibitor, leaving aside any claim of combination; that what ought to happen is this: your Honors ought to throw the consent decree out the window and enjoin any agreement by which exclusive runs are granted or by which clearance is granted and let the industry run on this wholesome basis, that distributor A goes to a theatre which cost three million dollars, a first-run theatre, and says to the exhibitor, "We would like to license our picture to you for a rental of one hundred thousand dollars." And the exhibitor says, "Well, what about my run? Do I get first-run,

exclusive first-run? And do I get clearance over houses charging a lower admission price, or over houses in the neighborhood?" And the distributor says, "We can't talk about that." And the exhibitor says, "Well, we always used to talk about it. For twenty years it was part of my agreement, and in 1940 the Government said that was all right, and consented to a consent decree signed by Judge Goddard, and now you say you can't talk about it," to which the distributor would have to reply, "Mr. Wright doesn't like it any more," and the exhibitor would say, "Well, how can I agree to pay you a hundred thousand dollars without knowing, and without your commitment that you won't go across the street right away and license the same picture for $50,000 to my competitor and have him start exhibiting it at ten cents on the day I start?" And the distributor says, has to say to him, according to Mr. Wright, "Don't worry about that. Don't worry about that, you know me pal!" That is the way Mr. Wright suggests this business should be done, that the distributor alone must do it; that it cannot be done as a matter of agreement; that although it is an essential part of the negotiations of the rental terms that the exhibitor should have some assurance that what he is licensing will not be immediately destroyed or cut down in value, still the Sherman Act forbids that kind of essential requirement.

And quite aside from the fact that we contend, and I think the Court will find, that Mr. Wright now takes a different view than the Attorney General and the Court did in 1940, that can hardly justify disregard of the recognition of these practices in the consent decree. They are plainly lawful. There is nothing in the Sherman Act which interferes with the ancient, as Mr. Davis said, the ancient practice of granting a negative covenant, reasonable in time and area, to protect against destruction. There is no more reason why there cannot be a negative covenant in connection with the licensing of a copyrighted motion picture than there is with other personal property or real property, in connection with which it has been recognized.

Judge Bright: You say we cannot change the consent decree in any of its particulars?

Mr. Seymour: Oh, no. If I said that, I went too far. What I meant to say, as we argue in our joint brief, on the consent decree, is that, of course, the Court has reserved power under the consent decree to make changes to effectuate its purpose, but the consent decree stands as recognition of an appropriate way to deal with many of these matters, approved by the court and by the Government, and it would take an extraordinary showing to induce the court to disregard the effect of that. That is but an application to this consent decree of the principles indicated in the Chrysler case and the Radio case, which we presented on our joint brief, and I did not mean the court was without power to change it, because, of course, the court has power, but there is an extraordinary showing required, more than that Mr. Wright has changed his mind.

I shall leave run and clearance and pass to two other matters which have been the subject of comment in the field of trade practice. The first is percentage contracts. It is perfectly plain that many pictures are licensed by all distributors on percentage contracts with all exhibitors. In other words, whether an exhibitor is affiliated or independent has no effect on whether a particular distributor will try to license on percentage. Distributors consider that percentage contracts give them a reward, directly keyed to box office receipts, giving them a higher reward on good pictures and giving the exhibitor some little protection on pictures which are disappointing at the box office.

Now what does the Government say about that? As I understand it, the Government does not challenge the fact that a picture may be licensed on a percentage basis. What it says is that the licensor and the licensee then become partners and accordingly that where one of these distributors licenses a picture to a theatre in which another distributor is interested, they become partners and therefore they are

partners in suppressing competition or somehow in dealing with competition at the licensee's place of business.

Now that seems to us to be most extraordinary new law.

It is quite clear that where property is licensed or rented on the basis of compensation not in a flat cash amount but for compensation based upon his share in the profits as a fair method of measuring it, the licensor or lessor and the lessee do not become partners. It has been settled for years in this State and in the Supreme Court, if the license or the rental or the share in profits is paid in reward for use of property rather than as a part of a relationship between the parties not related to the use of property there is no partnership relation created.

So that that attack or that claim that these people are all partners with each other, including all the independent exhibitors who are in the business, would strike most of the exhibitors as being a very odd new form of law. And I daresay that when Columbia licensed a picture to the Music Hall if it went out as a partner of the Music Hall and ordered a new pipe organ for the Music Hall, as it would be entitled to do as a partner, some question might be raised by the seller as to its capacity to commit the Music Hall on that basis. Not that the present organ is not entirely adequate.

Now on minimum admission prices, that has been adverted to, and I want to make only a couple of comments about it.

It is perfectly clear in this case that the amount gets into the contract because it is the exhibitor's admission price. He determines the admission price. It goes into the contract, and the effect of the contract is merely that on the limited number of pictures involved he will not lower his admission price during the period of the license, being quite free to do it afterward or to raise it during the period. It is also perfectly clear that where a particular exhibitor licenses from five or six distributors, he does not have a different admission price for each distributor; so the price tends to be the same. Now that is how the exhibitor's price is brought about, not because of any arrangement between the distributors.

Now what interest does the distributor have in admission prices? Obviously he has a direct interest in seeing that the total intake is not reduced by a reduction in the admission price after it has been agreed upon, and where there is a flat rental the distributor has an interest in not having him defeat his ability to pay the flat rental.

Furthermore, as the evidence shows, if the prior run exhibitor should reduce his price it would affect the distributor's ability to get high rentals from subsequent-run exhibitors. So that there is a direct interest by the distributor in that admission price.

Now it is a far cry, so far a cry that the gap can't be leaped by the Government, between a provision of that kind, having a direct relationship to the interest of the property owner and copyright proprietor, in getting the full reward for his license, and the typical price-fixing cases we are all familiar with.

Judge Bright: As I understand him, he says that the price fixing situation is present under those circumstances because you as a distributor charge, say, 40 per cent of the gross and the gross is earned by more entertainment than your feature. Therefore, you are fixing the price that he shall charge on other products than your own.

Mr. Seymour: I want to pass to that argument. I understood the Government to contend that aside from that argument the minimum admission price arrangement was illegal because it fell within the ban of the standard price fixing cases.

I want first to say that obviously it does not involve price fixing in the sense that was involved in the typical price fixing cases that the Supreme Court has had. Obviously it does not have any relationship to the Interstate case or the Masonite case as we point out in our brief, and I shall not go into that now.

Now their final argument is the one your Honor mentions. It is in effect, that where the distributor licenses a feature picture to a particular motion picture theatre, with

a provision in the agreement that during the existence of that license the theatre shall not charge less than 40 cents admission price, that arrangement is illegal because the distributor knows that the exhibitor may show shorts with the picture, or may play a pipe organ in the theatre, certainly will heat the theatre, and perhaps may have a double feature or may have a comic, an animated cartoon, with the picture.

Now first you notice that there is absolutely no tying-in in any of these licenses that have been referred to, that is, there isn't any requirement in any of these licenses that there shall be exhibited with the feature licensed something else. There is no relationship to what else the exhibitor shall do. The exhibitor is free to show the feature licensed, to exhibit cartoons, to spray his theatre with perfume, to play a pipe organ, to have newsreels or what he wants. So there is none of that typical tying-in which involves an attempt to use the price restriction to control something that is not a subject of the copyright.

Now if the Government is right about it—in other words, if the copyright proprietor having a percentage interest cannot assure that his percentage will be as high as he thought it would be when he dealt with the thing, that means this: that a copyright proprietor could fix a minimum admission price where he knew that the exhibitor was going to show in an open air theatre on a lawn during a time when it would be impossible for him to provide other entertainment, that is, if he was not going to heat the theatre, if he was not going to provide any music, if he was not going to provide any shorts, if he was not going to provide any cartoons, if he was not going to provide any stage show, it would be all right. Once the exhibitor in the exercise of his own untrammelled choice chose to put something else in to get the public to come in and pay money into his box office the copyright proprietor's right would be gone.

Now that seems to us nonsense in the absence of any attempt to tie-in the two, and we don't think that tying-in cases can possibly have the effect of denying the copyright

owner a legitimate right where renting does not have anything to do with something else that is added.

Judge Hand: Is this an old contention in this line of litigation?

Mr. Seymour: In the Interstate case the Government made this argument with respect to minimum admission price and the Supreme Court said that it found it unnecessary to pass on the argument, and assumed for the purpose of its discussion that a single distributor could do certain things, which I think indicates that the Court did not pass on it and certainly had no conviction on it, and your Honors are familiar with the Westway case and the Gary case.

Judge Hand: Yes. They really affirmed Judge Chesnut's opinion.

Mr. Seymour: In the Fourth Circuit in the Westway case.

Judge Hand: It was just a little per curiam.

Mr. Seymour: Yes, it was affirmed on Judge Chesnut's opinion in the Westway case.

Now, I should like to pass to the separate phase of the case in so far as it concerns Paramount. Paramount does follow in distributing its pictures these trade practices as every other distributor does. We believe they are lawful; we believe they have nothing to do with affiliation. Now, laying aside that aspect of the case, I want to deal with the phases of the case which concern Paramount particularly. First the Government argues that there is some kind of an illegal combination of Paramount alone. Your Honor asked about Fox this morning, and the Government said, "Well, we say Fox is an illegal combination even though nobody else is involved"; and I assume they would say the same thing about Paramount. The corporate structures are quite different, but I say they would say the same thing.

Now, why would they? If I understand the Government's point about these companies individually which is made in

their brief, it is that—and I think the argument is put this way—first, the ownership of theatres or an interest in theatres tends to subsidize poor pictures; and, second, the ownership of an interest in theatres provides an opportunity for violating the law—that there is a kind of a tentacle out there which might twist you with somebody else into violating law, and that it somehow subsidizes bad pictures.

Now, we have covered that matter in the joint brief. I do not believe there is any separate charge against each defendant except in those general terms. There is no evidence in this case whatever that the ownership of theatres is used to subsidize bad pictures. What is perfectly evident in this case is that every producer, every distributor, whether having a theatre interest or not, tries to make the best pictures he can. He is interested in getting the biggest box-office returns he can. He is trying to make money. Now, in the field of public taste, which is uncertain, where tastes change, where you can't tell when you make a picture precisely what conditions will be six months later,—obviously some pictures will be greater box office attractions than others. Some pictures, although considered to be greater artistic successes than others, will be poorer box office attractions.

Now, there is just no basis, I think, for the suggestion that these things tend to subsidize bad pictures. But what if they do? Why isn't a producer, having a lawful right to own theatres, at liberty to make mistakes as well as to be right consistently? Indeed, I do not know that the Sherman Act requires that people be more right in this field than in others.

And on this theory that it provides a kind of an opportunity for yielding to temptation and that your Honors ought to take that away, I would suppose that there were doctrines about temptation that antedated the Sherman Act, and that we have not yet found any way, by injunction or otherwise, to make people avoid temptation. And all the Sherman Act does is to provide relief where temptation has

been yielded to in the area in which it deals. So I do not think that we need to spend any time on this charge of separate illegality which, if I understand it, is the way I have stated it to be.

Now, what is the charge——

Judge Hand: I thought in their argument he claimed, in answer to my question, that they had an unlawful combination with their own subsidiaries——

Mr. Seymour: I think he does claim it, and I——

Judge Hand: —and that that might result in monopolization or restraint in a given town and at least create a local situation. Then I said to him, "How are they any worse with subsidiaries as regards the Sherman Act than if they stood as one big corporation alone?" And his answer was, "Well, I suppose the answer that the Supreme Court has given in some of these tax cases, if they did set up a corporate structure like that, they were bound by it in all the presumptive inequities that might be perpetrated if it was more real."

In addition to that, of course, there are cases where their interest is not very large in these subsidiaries, these so-called affiliates where they doubtless could have an unlawful combination.

Mr. Seymour: Well, let us see just where that comes out. I think I understand what your Honor says, but I am not sure that I understand quite what the basis of the Government's answers to your Honor's questions was.

Judge Hand: Well, I don't either.

Mr. Seymour: First I was dealing with a charge in the brief as to why each of these groups is an unlawful combination itself, and that charge is based, as I understand it, on the claim that there is some kind of subsidy of poor pictures and some kind of a temptation to deal——

Judge Hand: That is one of them. But that does not touch this thing we have been talking about.

Mr. Seymour: Now, I understood your Honor this morning when you asked Mr. Wright——

Mr. Wright: May I make a one-sentence statement?

Judge Hand: Yes.

Mr. Wright: That combination as such that Mr. Seymour is representing has both the power to exclude theatre operating competitors and the power to exclude distributors from playing time in its theatres, which is the result of combination and is illegal in itself.

Mr. Seymour: If I understand that—I don't believe I do understand it. I think what it means is that if I owned a theatre, I can say to a particular distributor, I will not license your pictures, and that is illegal. Now, that is the ordinary consequence of the ownership of property.

Judge Bright: I did not quite understand your statement now.

Mr. Seymour: Mr. Wright said, if I understood him, that this individual illegal combination that he is talking about, to which we are now addressing ourselves, has a capacity to exclude exhibitors and to exclude distributors. In other words——

Judge Bright: From your theatres?

Mr. Seymour: From the theatres in which Paramount has an interest.

Judge Bright: How would that be a violation of the Sherman Act? They have a right to show what they wish in their own theatres, don't they?

Mr. Wright: If the Court please, it is not just a question of their own theatres; it is a question of a multi-corporate organization—most of these corporations, each is a large circuit of theatres. The interest that the parent company holds in those corporations varies from 12 to 100 per cent. Most of them are 50 per cent or more. Now, the assembling and collecting of those corporations under common control does have competitive consequences which we say are sufficiently severe to make the combination an illegal one as such; and among those consequences are the power to exclude arbitrarily theatre operators from the areas in which they operate and to exclude arbitrarily the films distributed by

other distributors from these affiliated theatres; that is, theatres which are merely affiliated as distinguished from those which may be actually owned by the parent corporation.

Judge Bright: Do I understand you to charge them with the mere existence of the power to exclude and not the exercise of it still constitutes a violation?

Mr. Wright: We would argue that, but we do not have to on this record because we say that the record amply demonstrates the exercise and abuse of the power.

Judge Hand: Well, you see, I think this bears out what I said about his contention.

Mr. Seymour: I am glad your Honor asked it because it is getting more extreme all the time, and the more extreme it gets, the more absurd it seems.

Judge Hand: Well, he is going from strength to strength. Go ahead.

Mr. Seymour: Well, he is going from one place to another. Whether those are both strength, I don't know.

Judge Bright: Well, there would be some merit in his contention if he has proof of actual exclusions.

Mr. Seymour: There is no such proof, as your Honor knows.

Judge Bright: He says he has.

Mr. Seymour: As I understand it, what he says is he has proved a national combination. Now, that we are not talking about——

Judge Bright: We are talking about individuals.

Mr. Seymour: Well, what he says in addition to that, "I do not have to argue but I would be willing to"—having courage on all fronts, as we would expect—"I would be willing to argue that Paramount"—if I understand him—"Paramount is an illegal combination with the various theatre operating companies in which it has an interest because those theatre operating companies could refuse to buy pictures if they wanted to, and because they could, if they wanted to, exclude some other exhibitor coming into their area."

Mr. Seymour on behalf of Defendant Paramount

Now, I do not believe it will be contended——

Judge Bright: Some other distributor I think he said.

Mr. Seymour: He said both distributor and exhibitor. I will take it either way because there is no proof of either. In other words, what he says, as I understand it, is that the ownership of these theatre interests, because the operators of those theatres, all local operators, could refuse to buy, the whole combination is illegal.

Now, I think he is confusing, although I am not an expert in what he is confusing—I am prepared to say it is a good many things—but I think in this record he is confusing the kind of a corporate structure which might give rise under proper circumstances to a claim of illegality and one which might not. It is plain that where a company has a subsidiary and there is an unlawful agreement, you can have an unlawful agreement under the Sherman Act because they are two different entities; whereas if you had only one you could not have an unlawful agreement among itself.

Now, if that is what he is talking about we are in accord. It is perfectly plain that you have to have two entities to have an agreement between two entities; but it is also plain that if you have got one entity with a monopoly acquired under circumstances and with the intent to monopolize, that you can have a Sherman Act violation. That was the distinction I think he was talking about this morning.

Now, let me address myself to the charge he now says he makes, and that is that Paramount along with those theatre operating companies in which it has an interest, varying from 12½ to 100 per cent, is in itself an illegal combination. The evidence shows that those theatre interests were acquired beginning in 1919 to block the destruction of Paramount as a competitive element in this industry. At that time there was a combination of the most powerful exhibitors and many of the smaller exhibitors in this country to destroy Paramount, to steal away its stars, to steal away its market and boycott its product, and that is the way Paramount began to acquire its interest in theatres. It has ac-

quired subsequent interests for the purpose of protecting the outlet for its product. Many of those subsequent interests were acquired in competition with other distributors. There is not a word of proof in this case that the purpose of acquiring any of these theatre interests was unlawful in any aspect. There is not a word of testimony in this case that in fact any one of these theatre companies or any one of its theatres has been operated in such a way as to unlawfully exclude anybody. The fact is, as the record shows, that in these theatres Paramount pictures are shown; that the pictures of other distributors are shown. Sometimes they cannot get the pictures they want because other distributors license them elsewhere; just as any one of these theatres could refuse to put in salt water taffy if they did not want to, we can, of course, say, "We do not need your pictures," to a particular distributor. But I am entirely at a loss on this record to know on what possible basis it can be suggested that there is any unlawful combination involved in the Paramount structure. There is no proof of unlawful exclusion; there is hardly a claim of unlawful exclusion, of distributor or exhibitor.

Now, there is one phase of that which still is quite consistent with what I have said. That I will have to develop tomorrow, and that is the claim that there are a few small towns in which Paramount owns an interest in the one or two theatres of the town. If that is what Mr. Wright is talking about we can dispose of it very promptly.

Now, your Honor wants to leave, I think. Shall we stop now?

Judge Hand: All right.

Mr. Wright: If the Court please, we have these digests prepared. I do not know whether you want them overnight or not. If you do I will hand them up; if not, I will let them go until tomorrow.

Judge Hand: Very well.

(Adjourned to January 16, 1946, at 10:30 a.m.)

Mr. Seymour on behalf of Defendant Paramount

New York, January 16, 1946;
10.30 o'clock a. m.

Trial resumed.

Mr. Seymour: May it please the Court, yesterday when I referred to the fact that run and clearance had been used in the industry before any defendant had any interest in theatres, I should have mentioned the fact that the Government alleges in the amended complaint, in paragraph 114, that run and clearance came into the industry in 1915 and 1916, which is before any defendant had an interest in theatres.

At the close yesterday we were discussing the claim that Paramount, for example, individually was an illegal combination or that there was an illegal agreement among the Paramount defendants, and it was not quite clear what the Government's claim was. I think that consideration of the complaint in this regard, in the light of the Government's answers to further interrogatories clarifies the situation. The complaint, paragraphs 170 to 177, alleged the individually illegal combination of the several defendants with theatre interests, and, for example, alleged that they restricted production. Now, of course, that claim is out of the case. We addressed, last spring, an interrogatory to the Government, No. 43, asking what they expected to prove with respect to this claim of illegal combination individually, and their answer was, "Plaintiff states that it does not expect to show that specific independent producers or distributors were prevented from competing with any specific defendant or alleged combination of defendants. Plaintiff will argue that such prevention is a necessary consequence of the mere existence of the combinations referred to in paragraph 170 of the petition."

I take that to mean that in so far as distribution is concerned the contention is that, where Paramount owns an interest in theatres, since those theatres exhibit Paramount

pictures, and, to some extent, the pictures of other distributors, to that extent they disable themselves from exhibiting pictures of other distributors, and to that extent exclude. In other words, that the ownership of theatres in itself is illegal, a contention with which Mr. Davis dealt yesterday and which I do not think needs to detain us today.

The remaining part of that complaint, I think, relates to the so-called claim of individual theatre monopolies where a defendant owns all the theatres in a particular town. That I shall deal with in a few moments.

Now, it is perfectly clear that the Paramount defendants have and can acquire no monopoly of production, distribution or exhibition.

Judge Hand: Is this a quotation from the answer to the interrogatories in your brief?

Mr. Seymour: It is not in our brief because the question did not arise as to what the claim was until yesterday; but it is on file and it will be in the stenographic transcript.

Judge Hand: I see. Well, it will be in these minutes of this argument.

Mr. Seymour: Yes.

Now, the Government rather reluctantly but definitely withdrew its claim of any monopoly in production, and we do not need to spend any time on that; but the testimony which eventually forced the Government to that concession is still important because it shows that really there is no restriction on distribution in this country; that any picture produced gets distributed, and profitably distributed; so not only is there no monopoly of production but obviously there is no monopoly of distribution.

Now, it is perfectly apparent that anybody who wants to embark his capital on creating a distributing organization with the exchanges and the salesmen, and so on that has to be provided, can do so. There is no restriction on doing so. The evidence shows that distributors who have not any interest in theatres including distributors who are not defendants in this case, have prospered during the very period of alleged combination and conspiracy.

Mr. Seymour on behalf of Defendant Paramount

Paramount has no monopoly of exhibition. Paramount has an interest in 1550 theatres, which is somewhat under 9 per cent of the total theatres in the United States. Of that number it has an interest amounting to over 51 per cent in companies which own or operate 500 theatres; so that its total interest in companies which it can be said to control involves approximately 3 per cent of the total theatres in the United States. And again I shall lay aside the claim of local monopoly, which I shall come to in a moment. So that really the case here comes to the vague claim of combination between the defendants, and I should like to analyze that a little more. Mr. Davis dealt with it effectively yesterday.

The Government's claim in that respect has been variously stated to arise out of cross licensing, diagonal licensing, and now I think Mr. Wright expresses it in terms of cross use. Now, the cross licensing theory which the Government had originally, apparently, was that where Paramount licensed pictures to a theatre in which Warner had an interest, and, in a different licensing transaction at a different time, Warner licensed pictures to a theatre in which Paramount had an interest, those transactions were so related that they amounted to cross licensing.

Now, the evidence in this case generally completely destroys any such claim and shows that there is no relationship between the transactions; and I am going to deal with the specific Paramount evidence on that score in a moment. The diagonal licensing claim which is now used in the Government's brief as sort of a substitute for cross licensing seems to be this: that where Paramount licenses a Warner theatre, say, in Camden, New Jersey, Paramount acting as a distributor licensing to the Warner theatre which is an exhibitor, that that, in effect, creates two horizontal agreements, one between Paramount as a distributor and Warner as a distributor and the other between Paramount as an exhibitor and Warner as an exhibitor, having in mind the fact that in Camden, New Jersey, there is no theatre in which Paramount has an interest.

Now we think that is a wholly fanciful theory. Such a transaction is simply between Paramount as distributor and Warner as exhibitor. It does not relate to any other transaction. There is no agreement between the two parties at the distribution level as the evidence shows, and to say that it is an agreement between the Warner Theatre in Camden and a theatre separately and autonomously operated in which Paramount has an interest, say, in Minneapolis, is simply it seems to us perposterous. Certainly that is not the consequence of that transaction.

To think of an analogy, although books are sold and not licensed, it would be as sensible to argue that where Scribner's books are sold in the Putnam book store that there is an agreement between Putnam and Scribner as publishers and also an agreement between the Scribner and Putnam book stores. It seems to us that that is not so. The parties are simply dealing at different levels and unless there is an illegality in that restraint nothing can be made of it. And what the Government attempts to do is to take all these agreements, describing them as cross-licenses or diagonal licenses, and add them together and say that out of that you get some kind of combination. We say you can't do that.

As far as Paramount is concerned you can't consider it even diagonally as an illegal agreement because as the evidence shows incontrovertibly——

Judge Hand: Now I never understood really what that word "diagonal" meant. It seems to me that it is a great vice that is very common now in all kinds of arguments—I guess it always has been—of using all kinds of figures of speech which people love. Half the time they don't understand them themselves and nobody else can. They are picturesque.

Mr. Seymour: It is hard to understand, but as I get it from the Government's presentation in its brief it says that where Paramount at this level as a distributor licenses to Warner at this level as an exhibitor, that that is diagonal

licensing. It is in that sense that they add them all together and say that we have a combination. Even if the theory had any substance it couldn't possibly be applied to transactions involving theatres in which Paramount has an interest.

Your Honors will recall that the evidence shows that in 1932 Paramount gave up centralized operation of its theatre interests; that from 1932 on, all the theatres in which Paramount has an interest except for the Paramount Theatre in New York and the Newman Theatre in Kansas City, as to which no special point is made, are operated locally by separate companies in which Paramount has varying interests from 12½ to 100 per cent. Those companies have had headquarters in the areas where the theatres are operating. They are in charge of local operators. The local operator in the case of a 100-per-cent-owned company has a contract giving him the right to decide such questions as film licenses and all questions of operating policy, and his reward is in part based on the profit of the theatre operations. Where Paramount does not have a 100 per cent interest, where it has 50 per cent or some lesser amount, the theatres are operated by the stockholders on the ground who also have a right to operate autonomously and who look to their stockholding for their profit.

Now the importance of that is, when you take into account the further testimony that there is no relationship whatever between the separate licensing transactions of those companies and the licensing transactions of Paramount through its distribution department, the importance of that is that you could not even consider any transaction in which one of those theatres is involved as anyhow related to any transaction in which Paramount acts as a distributor. It is perfectly apparent that those companies are operated in a genuine sense independently of any control by Paramount, so far as film licensing is concerned and therefore in none of those theatres can Paramount be regarded as an exhibitor. So that when Warner, for example, licenses a picture to one

of those theatre-operating companies for exhibition in one of those theatres, it is not a license to Paramount, and in that sense there is no diagonal quality in it even if it makes any sense in any context. It is perfectly apparent that since those local operators depend for their compensation upon the profitable operation of those particular theatres that there could not be any relationship between what Paramount gets as a distributor from a Warner theatre or a Loew theatre and what they pay. In other words, they are in a position where it would be impossible to have any relationship between those things without hurting the interests of the local operators, which they wouldn't stand for, and would not have to under their contracts.

Now that, I think, so far as Paramount is concerned, completely destroys any of these fancy theories of cross-licensing or diagonal licensing, aside from the general testimony that there isn't any such thing and there isn't any conditioning of licensing. Indeed that is pretty explicitly admitted in the Government's brief. And the statistics referred to in the briefs show there is no relationship between the film rentals paid to the various defendants as distributors by the various theatres in which they are interested.

So that I think the theory which the Government operates upon is completely destroyed by the evidence in this record as far as any such claim is concerned.

Now the Government's claim, as Mr. Davis pointed out yesterday—and I won't dwell on it—is really made up on just a mathematical basis aside from this empty theory of cross licensing. The Government simply adds up the total amounts paid by all theatres in which all defendants have an interest and arrives at some percentage which it says shows combination. And that is done by saying that they collectively received certain amounts and that they have a monopoly position. You can't by mathematics create collective action and you can't by mathematics create a monopoly position. And we have analyzed those figures in our brief.

It is apparent that the Government takes a figure of 70 per cent and calls it 70 per cent of different things every time it describes it, and whatever the errors are in that calculation, and however illusory the calculation is, the basic fallacy is that it attempts to add together the wholly separate operations of five active competitors and attempts to get your Honors to say from that, that there is an illegal combination. And in the absence of agreement or concert of action, it is perfectly evident that those statistics and those mathematical aggregations are simply irrelevant to the charge.

Perhaps there is a claim, although certainly it is not explicated or made clear, that you should conclude that there was some kind of combination because of some pattern of conduct among these defendants. It is suggested as to that pattern that the defendants favor each other's theatres over independents. If that were so, if you had a pattern where in every case the defendants always favored each other's theatres, and if the favoritism was illegal, you might have some pattern which would be significant, but the evidence in this case completely refutes any such thing, and I will deal with it as far as Paramount is concerned.

I may say that this pattern that the Government refers to is set forth with respect to the 92 larger cities in the country, selected simply because they have populations of over a hundred thousand and not because they are really any separate market, as they are not, so the question is, does that pattern appear there? What the record shows, as far as Paramount is concerned, is this: Paramount has interests in 47 large theatres in those 92 cities. In those theatres Paramount pictures are exhibited. In many of them pictures of other distributors are also exhibited, since normally a theatre needs more than the product of any one distributor in order to operate the year around. The evidence shows that in each case the quality of those theatres is such that they are the natural choice as a matter of sensible customer selection for those who license them. Surely the fact that Paramount licenses its own pictures to theatres in

which it has an interest does not show any favoritism to other distributors. It shows that the theatres have been operated precisely as one would expect, primarily for the purpose of giving an opportunity to show Paramount pictures.

Let us look beyond those theatres to the remaining 45 cities out of the 92. What we find there is that in the remaining 45 cities Paramount sometimes licenses its pictures on first run to theatres affiliated with other defendants and sometimes to independent theatres. In many of those cities there are competitive theatres on first run, in all there are other runs, but the evidence clearly shows why each one of those theatres was chosen, and it clearly shows that Paramount was merely exercising its judgment to get the theatre which would provide the highest revenue. But the significant thing is that in fifteen of those cities Paramount licenses independent theatres first run. And the evidence shows why it chooses those, that in those cities Paramount considers that those theatres are the best outlets for its product. And in eleven of those cities there are affiliated theatres.

In addition, Paramount splits its product in five cities between independent and affiliated theatres. I think it plain that if there were anything in this theory of pattern, that consistently defendants favor each other's theatres, choose each other's theatres, solely because they are affiliated, you would not find any case of selection of an independent theatre over an affiliated theatre, and yet in Paramount's case you do find it in a significant number of cases.

I won't burden the Court with the detail of that evidence but I think it is perfectly plain from the evidence that we produced, and indeed, from the evidence that each defendant produced, that the selection of theatre outlets for first-run, other than theatres in which the particular distributor is interested, bore no relationship to affiliation, that is, it was not based on affiliation; that it was based upon the individual exercise of business judgment by the particular distributor as to the best outlet, and the fact that in many cases the best outlet in a particular place was an affiliated

theatre was due not to the fact that it was affiliated but to the fact that the particular defendant had chosen to have interests in the best theatre or the theatre comparable to the best theatre in the town, which is no violation of the Sherman Act.

It is suggested that there is something odd about the fact that there is relative stability of accounts in this business. The evidence explains why that is. The evidence explains, in Paramount's case and in the case of other defendants, that where they have a satisfactory account, the tendency is to stay with that account; that it is preferable to continue a satisfactory business relationship than to change it. In the Paramount case there is testimony that if they were to change it for temporary advantage and then the new account were found to be unsatisfactory and the old account had filled its time with another distributor's product, the net result would be very unsatisfactory from Paramount's point of view.

It is apparent from the evidence that there is active competition between distributors for an opportunity to show their pictures. The figures on individual pictures show that some pictures are shown in five thousand theatres, some in ten, some in fifteen, reflecting the fact that sometimes a distributor does better and sometimes poorly in the attempt to get licenses for his pictures in a large number of theatres. But it is true, undoubtedly, that there is a tendency in this business, both with an independent account and with an affiliated account, not to go running around trying to see if you can do a little better on this picture or that. And the Government theory that these pictures could be licensed effectively by mere auction block technique, so that the largest theatres would get the product anyhow by bidding the highest prices, is simply a suggestion of introducing chaos into a business that has served the public pretty well as it is.

Now, the Government has referred to so-called pools, and I want to say a word about them. The evidence shows that now, or at least until recently, in eight localities in the

United States, Paramount had operating agreements; that is, theatres in which Paramount had an interest had entered into local operating agreements with theatres of some other defendant. Now, the evidence is clear and undisputed that those operating agreements were originally made during the depression; that they were made to effect operating economies; that they did not result in advanced admission prices. Indeed, the evidence in at least one case is that it resulted in a decrease in admission prices; and there is evidence further that the arrangement did not reduce the total number of films used by the theatres. So that all you have is a local situation with several particular theatres based upon local conditions which were deemed to effect local economies.

Now, the Government, if I understand it correctly, does not make any particular request for relief with respect to such local situations. What it says is that they show a general intent to conspire and agree and combine among these defendants.

Now, plainly it could not make any request for relief, it seems to me, on this record as to any particular local situation of that kind, because there has been absolutely no showing that the local arrangement had any effect on interstate commerce. The number of films was not reduced, and there is no showing that public or other disadvantage arose. But from the point of view of intent generally, it seems to me perfectly apparent that those local situations show nothing about intent generally. What they show is that there was a decision during the depression in that locality with respect to the particular theatres involved to make an operating agreement. The very contrast between the number of localities where there are such operating agreements and the large number where theatres affiliated with different defendants are in active competition and not subject to an operating agreement shows that there was no intent generally to eliminate competition between them.

Judge Bright: Do you make a distinction between operating agreement and pooling agreement?

Mr. Seymour: I call what the Government calls pool an operating agreement because that is what the evidence calls it, and the Government calls it a pool because it suits its purposes to call it a pool. Now, I do not think there is any real difference between them. In both cases there is an agreement for the operation of theatres locally, and the Government calls it a pool. I can't see that it makes any difference in its legal effect, whatever you call it.

Judge Goddard: Mr. Seymour, that refers to a situation where two or more defendants have an interest in the same theatre?

Mr. Seymour: I did not hear the first part of that question.

Judge Goddard: That refers to a situation where two or more of the defendants have an interest in the same theatre?

Mr. Seymour: Generally not. It refers to the situation, such as there was in Grand Rapids—although that does not involve two or more defendants—such as there is in Minneapolis or was in Minneapolis where a theatre in which, say, Paramount had an interest, and a theatre in which, say, RKO had an interest agreed that they should be operated through a common operator in order to effect economies. They do not generally involve only one theatre; they involve several.

Now, those are the things that the Government calls pools, and they are the things we call operating agreements.

Now, in addition to those there are several situations where there is a lease, or something like that, where a theatre has been leased to one of the other defendants, or to a corporation in which another defendant has an interest. Now, sometimes the Government calls those pools. They certainly are not pools, and there is nothing on this record to indicate any impropriety in any of them. I would suppose that one who owned a theatre was entitled to lease it to the best possible lessee, the person who is most likely to pay the rental

and to operate it effectively. And there is nothing on this record to challenge any of those.

Now, I should like to refer specifically to the one situation involving Paramount, as I recall it, which Mr. Wright mentioned yesterday, and that is the situation in San Francisco, because I think it throws a good deal of light on this claim of the Government's.

Judge Hand: Now, before you do that, I am not entirely clear why the Government does not or that it should not, if there is violation of the Sherman Act in this West Coast situation, ask for relief against it in this case. You say that interstate commerce is not involved. I should think it probably was.

Mr. Seymour: Well, what I was talking about, if your Honor pleases, were the eight so-called pools to which Paramount theatres are parties. Now, the San Francisco agreement which I am about to come to is not included in that group because it is not a pool or operating agreement in the same sense, and I just want to mention that San Francisco situation.

There in 1930 Paramount leased theatres to the predecessor of Fox in accordance with an arrangement, which I think is in evidence, which provided for payment of rent in terms of an interest in the profits of the operation of the theatres, and gave a franchise on Paramount pictures. Now, the original reason for that was obviously to have the theatres properly operated and to assure an outlet for Paramount product. But in 1932 or 1933 Fox terminated that arrangement. Paramount then had a claim of 12 million dollars against Fox. Paramount was in bankruptcy and Fox was in bankruptcy, and the claim stood in the way of reorganization. And in order to forward reorganization, the agreement made by the trustees in bankruptcy, I think in 1934, which is in evidence, which provided for a lease to Fox of those theatres and a franchise by Paramount, so that Paramount could exhibit its pictures, was submitted to Judge Coxe in the Paramount reorganization for his consideration and approval; and it was approved.

Now, we do not say, of course, that his approval involved any consideration of the Government's present claims, but we do say that the fact that that agreement was submitted to a reorganization court shows not as the Government claims that the agreement evinced an intent to monopolize or to restrain trade, but that it evinced an intent to facilitate reorganization of a bankrupt company; and there is none of that quality about the thing which could possibly show, I think, any such intent as the Government tries to attribute to it.

Now, I want to say a word about the Paramount formula deal which the Government has adverted to in brief and argument: Your Honors will recall that we brought out on our direct case that with many of the theatre operating companies in which Paramount has an interest but not with all, Paramount pictures are licensed on a so-called formula deal basis, and the typical formula deal contract is in evidence; and that provides that Paramount is to receive a percentage based upon the national performance on the pictures licensed to the particular companies in which Paramount has an interest. Our witness showed that in his opinion that gave Paramount what it regarded as a fair rental and a higher rental than it might have obtained in other ways; and the Government does not contend, even if it would be relevant, which I doubt, that that gave the Paramount affiliated companies more favorable terms than their independent competitors, as far as rental is concerned.

Now, it also appears that when the Paramount distribution department was in a controversy with Evergreen, which is one of the National Theatre companies, and they could not get together on terms, Paramount suggested that a formula deal be worked out with Evergreen, Paramount thinking that that would give it a larger reward for its pictures; and it worked out that way.

Now, again, I do not understand it to be claimed that the terms of that deal gave any rental advantage to Evergreen. Certainly, if Paramount got more than it would have gotten

in some other way, it did not give Evergreen any advantage over Paramount.

Judge Bright: How extensive are your formula deals throughout the country?

Mr. Seymour: They are made, so far as I am aware, if your Honor pleases—they are made with many of the companies in which Paramount has an interest; and in addition there is a formula deal with Evergreen. So far as I know there are no others.

Judge Bright: Are there any formula deals with exhibitors other than those of the defendants, associated or affiliated with the defendants?

Mr. Seymour: So far as I know there are not, your Honor.

Now, of course, the thing originated in an effort to work out a method of compensation to Paramount for its own pictures in theatres in which it had an interest. Similar terms were worked out with Evergreen for some of the theatres in which National Theatre has an interest; and as the evidence shows, the formula deal is of relatively recent development.

Now, the Government's claim about it seems to be twofold, first that it shows a non-competitive atmosphere in the industry. Well, I would not suppose that the fact that the formula deal was used with the theatres in which Paramount had an interest in connection with Paramount pictures shows anything about the competitive quality of the industry. We claim we would be entitled to make reasonable deals with the theatres in which Paramount has an interest, and it does not affect competition generally. And so far as the formula deal with Evergreen is concerned, it is evident that Paramount got higher rental than it otherwise could have gotten.

Now, what the Government also says about it is that somehow, although it did not prejudice other exhibitors in rental terms, it gave those who had the formula deal an opportunity to play the pictures for longer than the other exhibitors had the right to do, and that might prejudice them.

Now, the trouble with that claim is that there is no evidence of anything of the kind. There is no evidence by any exhibitor or by any document that the privileges under the formula deal have been abused by any of the theatres in which Paramount has an interest; and in the absence of such evidence, this claim of possible prejudice is just sheer speculation, and I think cannot show anything as to the impropriety of the formula deal between Paramount and the theatres in which it is interested.

Judge Bright: The theatres under the formula deal are licensed under the same form of agreements with other theatres

Mr. Seymour: The formula deal agreement which fixes the formula percentage and the other terms related to it has attached to it the standard form of agreement.

Judge Bright: Well, is there any evidence in the case that in any instance with exhibitors having the benefit of the formula deal, that there had been any different or preferential clearance or run provisions?

Mr. Seymour: None so far as I know, if your Honor pleases. I think, in other words, that the claim that there is any disadvantage through operation of the formula deal is simply speculation, and I cannot see any possible basis for that claim except just as a matter of theorizing, and if there was any basis for it they should have come forward with some proof.

Now, I want to pass to this question of local monopoly——

Judge Bright: Before you go to that, Mr. Seymour: You have been speaking about pooling arrangements, and you dealt solely with pooling arrangements in so far as Paramount alone is concerned. I may be mistaken, but as I understand the Government's contention, it is that the existence of pooling arrangements throughout the United States, and so many of them, show a pattern of interlocking or interdealing between the defendants, which is capable of the inference that there is some understanding to restrain competition.

Mr. Proskauer: There is not any such evidence.

Mr. Seymour: Well, let me make a comment on that. I think perhaps that is the Government's claim, because Mr. Wright said yesterday that there were ten possible combinations out of five defendants, and that they all appeared in pools.

Well, the fact of the matter is that there are eight so-called pools between Paramount theatres and theatres in which another defendant is interested, but in some of those situations there is an affiliated theatre in competition with the pooled theatres. Now there are so-called pools in which Paramount has no interest whatever and is not involved in any way. Theatres in which Paramount is interested, as the evidence shows, have operating or "pooling" agreements with independent theatres in various local situations. But since they have not been brought into question here, no details of these are in evidence.

Now, it seems to me perfectly evident that you can't take isolated local pool situations involving the theatres of two defendants, say in Minneapolis and St. Paul, add them to the so-called pool that Mr. Wright referred to yesterday between two other defendants in Albany, and say that you get some national pattern because there is no evidence at all that they involved anything but the local interests and advantages of the particular theatres involved. And when you add to that the fact that at least as far as Paramount is concerned, and I think as far as others, similar agreements have been made with theatres of the independents, all you get is a series of pools. And you certainly don't get any aggregate of national significance. And it certainly is apparent from all the evidence that they didn't pool in lots of places.

Now, I want to talk about this claim of local monopoly as far as Paramount is concerned. Mr. Phillips reminds me that Mr. Wright said yesterday that there were thirty so-called pools in the United States, which is an insignificant number considering the number of theatres.

Mr. Wright: What I said was that there were thirty in evidence.

Mr. Seymour: Well, I think with Mr. Wright's enthusiasm for getting everything in evidence, we can assume that that is a pretty fair percentage of those that he has discovered.

Now, on the local monopoly claim, as far as Paramount is concerned, that arises in two aspects apparently. First the Government says that there are forty localities in which affiliated theatres are the only first-run theatres. In a few of those Paramount has the only first-run theatres. In others two defendants or three defendants may have the only first-run theatres. The Government chooses to call those closed first-run situations. Now that it seems to me adds nothing to this case and shows nothing of significance in the case. In each of those cities it appears that there are other theatres operated on other than first-runs in competition with these first-run theatres. The use of the word "closed" means nothing so far as this record is concerned except the fact that those are the first-run theatres in the town accepted as such by distributors in licensing their pictures. There is nothing to indicate that there is any other theatre in any of those towns which is of a size and location which would normally make it a natural choice for a distributor to license first-run, and using the word "closed" is a convenient way of saying that in those places the particular theatres have all the first-run product. In the absence of some evidence of exclusion of some qualified theatres—and there is no evidence; in fact the evidence is to the contrary—those so-called closed first-run situations where there is obviously competition with other theatres in the town I think need not detain us at all.

Now I want to talk about the other aspect of this so-called local monopoly situation and that is this: the Government lists in its brief 157 towns taken from the record in which it says Paramount has an interest in all the theatres. Now there is a little error in that calculation. There are only 151 in the record because some of them are duplications. It does not make any difference which figure we take, 151 or 157. Those towns are in various locations,

many of them in the South, where a particular operating company in which Paramount has an interest, has an interest in all the theatres in the town.

Now we think that is of no significance in this case because no attempt has been made, utterly no attempt has been made, and there is no evidence that those theatres were acquired by predatory practices, that those theatres excluded, or the operators of those theatres have excluded anybody else, or indeed that there was any need for any other theatre in the town, or that anybody would have thought of providing one.

Let me give you some idea of the size of the towns. Out of 151 towns which we think the record correctly indicates, there are 47 towns with one theatre.

There are 61 towns with two theatres, 28 with three, 12 with four, and two with five. The towns involved run all the way from such well known localities as Needville, Texas, which has a population of 500; Exmore, Virginia, with a population of 932; Smakover, Arkansas, with a population of 2,235; Yoakum, Texas, with a population of 4,733, up the scale of populations until you get to populations of—well, there is one town of a little over 20,000, one town of a little over twenty-one, and several with around twenty-four, but, in general, the towns are very small towns with one or two theatres. There is not the least indication that anyone would want more theatres in any of these towns or that anybody has been kept from having them. There are three towns of more significant size, which are in that list, West Palm Beach, Florida, where it appears that Paramount has an interest in five theatres. That is adjacent to Palm Beach. And in Norwalk, Connecticut, a town of 39,849, Paramount has an interest in one theatre and that is adjacent to South Norwalk. And Newton, Massachusetts, which has a population of 69,000, where Paramount has an interest in one theatre, is adjacent to Boston. In all those larger localities to which these towns are adjacent, there are many theatres

operated in competition, and it is perfectly apparent that these places are simply suburbs from which people go to see pictures in the larger place, as they do in so many localities.

What does it show? What it shows is that over a period of time the theatre-operating companies in which Paramount has an interest have owned and operated one, two or three theatres in these small towns. It is perfectly plain that it is no offense under the Sherman Act to be a lone trader, as has been said in the Pullman case recently, which your Honors will get a little tired of, because I think it is quoted in almost every brief, although it is good doctrine.

And there is no evidence of exclusion, no evidence of predatory practice, no evidence that anybody has been kept out.

Suppose a theatre operating company in which Paramount is interested should have to get rid of its interest in one of these theatres in one of these towns where it has the only theatre, wouldn't the next fellow be a monopolist? Wouldn't he have the same power of exclusion? That is, that he would be able to use only a certain number of pictures and he could not use more. And therefore it seems to me that this local monopoly phase of the case is quite empty of any content.

We have shown that there are some 11 or 12 hundred localities in the United States in which independents own all the theatres, and in which no defendant has any interest. There is no more reason to suppose that there is a violation in the little towns that have been referred to than there is in those other towns, and your Honors will remember that there are some 16,000 incorporated places in the United States, and Paramount is charged with having an illegal monopoly in 151, which, as I figure it, is somewhat under 1 per cent, and when you consider the size of these places, down to 500 in population, I doubt if your Honors will think that you can draw the line in any place and say that on the evidence in this case there is any possible illegality.

I want to pass to one other charge and I will be through. The Government's brief refers to discrimination but it is not

quite clear what is meant. Sometimes it looks as though what is meant is that a particular defendant in some situations has discriminated against some exhibitors, sometimes independent exhibitors. Plainly, most of these claims of discrimination are not made out, if that is what they mean. In other words, if they mean that generally there is a policy to favor affiliated exhibitors over independent exhibitors, we proved for Paramount, for example, that all the deals that are made with any kind of exhibitor are made indiscriminately between affiliated and independents, and if that charge is some general, vague, charge of discrimination, it does not have anything to do with this case. This case charges a national combination, and unless the Government can show a studied, concerted program of discriminating for the purpose of restraining trade or obtaining a monopoly, these episodes of discrimination would be irrelevant.

Finally, we are dealing here with licensing. We are dealing here with licensing of copyrighted products, and not dealing with sales, and there is no statutory inhibition of discrimination in connection with licensing, such as there is with sales. I say that, not defensively, because I will show your Honors in a moment that this claim of discrimination, as far as Paramount is concerned, is empty, but it is a kind of irrelevant comment in this case because it hasn't anything to do with the merits of the case.

The Government talks about franchises and refers to the fact that Paramount granted franchises at one time. The evidence shows that eight or ten years ago Paramount, as a matter of policy, discontinued granting franchises. It is clear that under the consent decree the consenting defendandts were forbidden to grant long-term licenses, because of the trade showing requirement and the block of five requirement, and it is clear from the evidence that Paramount, like the other consenting defendants, has adhered to the provisions of the decree despite the fact that that particular provision has lapsed.

Mr. Seymour on behalf of Defendant Paramount

There is no evidence in this case of the granting of any franchises in the last eight or ten years by Paramount and the whole thing is utterly irrelevant. Even while Paramount was granting them, it appears from the evidence in this case that, more were granted to independent exhibitors than to affiliated exhibitors.

Finally, although this has no particular application to Paramount, the Government now seems to have some bitter criticism of ten-year franchises, and yet it is just ten years ago that in this Court, in 1936, in a suit by the Anti-trust Division against Warner Bros. and certain other defendants, the Government insisted that two of the defendants, Warner and RKO, grant a ten-year franchise to an exhibitor in St. Louis as a condition for discontinuing the suit. So that its enthusiasm for franchises, like so many other things, that it once was for, has waned, since it took official action to the contrary.

The Government talks about master agreements, and says there is something wrong about master agreements. We have had that all out here in the testimony. It appears, as far as Paramount is concerned, and, indeed, as far as other defendants are concerned, that the so-called master agreements are sometimes used as a matter of convenience in dealing with a large number of theatres, and the only purpose of those agreements is to avoid writing a separate and detailed contract with each theatre. There is a general contract with the standard form attached, at least in Paramount's case, and then a separate deal sheet for each theatre. Even in a time when there wasn't a paper shortage, I should suppose that that practice, which the evidence shows Paramount followed quite indiscriminately in dealing with any large group of theatres, was perfectly lawful.

Judge Hand: Just what is that? What did they do? I have forgotten it.

Mr. Seymour: Well, where Paramount, for example, licenses a company with, say, ten theatres, instead of writing a separate license agreement for each theatre, it may, and

the other defendants sometimes do the same thing, make one master agreement with the operating company and a separate deal sheet for each theatre, and it is simply a paper and time-saving device. There is no evidence of any abuse of the thing or any discrimination. Paramount does it with any customer who has enough theatres to make it a time-saving device.

The Government talked at one time——

Judge Hand: Dealing with one customer, or a customer with subsidiaries, I suppose, that is, a lot of theatres.

Mr. Seymour: It is the multiplicity of the theatres and the number of theatres that causes this method of dealing.

Now, during the trial it was suggested that Paramount had discriminated in rental terms against independent exhibitors and yet, although the Government had access during its preparation of this case to hundreds of thousands of licenses, its brief does not mention a single example of the alleged rental discrimination by Paramount. So that is out of the case as far as Paramount is concerned.

Then the Government says that Paramount has somehow discriminated in clearance terms, that it has somehow been more favorable to affiliated theatres than independents. I dealt with that yesterday. There is nothing in it. Paramount has applied, in dealing with independents and affiliated theatres, the same kinds of considerations affecting the length and the scope of the clearance that it applies in any other case. The clearance terms vary from area to area. There is no pattern about them, but, for every long clearance that you can find in this record in favor of an affiliated theatre, there is an equally long clearance somewhere in favor of an independent theatre. And for every broad clearance that you can find for an affiliated theatre, there is an equally broad clearance somewhere for an independent theatre. And it shows merely that in the particular area where the particular customer was affiliated or independent, the clearance was granted which seemed appropriate. The remedy, if the clearance is too long, is provided by the decree.

On this whole question of discrimination I have only this final word to say. The Government, not having advanced any real proof of discrimination, says that the defendants had it in their power, since they had all the license contracts, to come forward with documentary evidence that there was no discrimination, and that the fact that they did not do so should lead the Court to conclude that there must have been a multitude of discriminations. Your Honors had that before you on the discussion of the Government's motion to strike. It seems to us nonsense. I rather think it appeared, when it was suggested before, that the Government has the burden of proof. The Government had access to everything. They cannot shift the burden to us or obscure the fact that they have not come forward with any real proof, by saying we had the contracts and we should have snowed your Honors under—a thing which you would not have let us do—snowed your Honors under with thousands of contracts.

We feel that on this record the Government is entitled to no further relief, and that there has been utter failure to show the combination or conspiracy which it set out to show, or any individual restraint as far as Paramount is concerned, and that appropriate judgment to that effect ought to be entered.

I don't know whether your Honor was serious yesterday in a discussion with Mr. Wright about this, but I would like to make a comment on it. Mr. Wright, I think, suggested that it might be a good idea to restrain the affiliated theatres from using the product of other defendants. That would simply mean, of course, that the affiliated theatres, where they needed the product of other distributors, would be required to turn out their lights and get our of competition, or buy Westerns or similar pictures from other distributors who were not bound by the decree. How that would forward the competition which the Government is interested in eludes me.

Judge Bright: You just mentioned the fact that you did not think the Government was entitled to "any more

relief." You mean more than has already been given in the consent decree?

Mr. Seymour: Yes.

Judge Bright: How far can this Court go on that proposition? In other words, have we got to find a violation of the Sherman Act in order to grant any relief to the Government or, if we cannot find a violation, must we dismiss and set aside the consent decree?

Mr. Seymour: I suppose there are maybe as many views about that as there are lawyers, but I will give your Honor my view. The consent decree reserves certain issues for trial and certain prayers for relief. It disposed of certain issues subject to the Court's reserved power to modify the decree upon a showing that it was not working properly. We are here and have been here on the reserved issues and the reserved prayers for relief, the consent decree having, as I have said, disposed of the issues which were embraced within it, to-wit, the issue of clearance, the issue of run, and things of that kind.

It is our view that what the Government has failed to do here has been to prove any violation of law on the reserved issues, and, therefore, any right to further relief by way of divorcement, which is what was reserved for trial. That being so, whether the form should be dismissal or simply a denial of the request for further relief on the reserved issues, I am not quite clear, but it would not, of course, affect the existence, I think, of the consent decree, that having dealt with issues carved out and which are not now on trial.

Judge Bright: I understood Mr. Wright to say yesterday that he thinks we should scrap the consent decree.

Mr. Seymour: That is what he thinks.

Judge Bright: That would mean starting de novo.

Mr. Seymour: That is right. That is what he thinks. We do not think so. We think that those issues are dealt with in the consent decree subject to your Honor's ability to modify upon a proper showing, which has not been made.

Judge Hand: What about the three years?

Judge Bright: About block selling?

Judge Hand: Yes.

Mr. Seymour: You are talking about——

Judge Goddard: That is one of the settled issues.

Mr. Seymour: For example, on block booking, if that is one of the issues your Honor is thinking about——

Judge Bright: Wasn't there a three-year limit to that?

Mr. Caskey: No, sir. Permanent.

Judge Bright: What was it the three-year limit was set for?

Mr. Seymour: My colleagues remind me that the three-year provision was a provision by which the Government agreed not to press the issues for divorcement for three years, and that three years have elapsed and the Government is now pressing both issues. There are certain other provisions which elapsed by reason of the Government's failure to get similar injunctions against other defendants not parties to the decree, and they concern such things as block booking, and as to those the decree has lapsed and yet the defendants who consented have been abiding by those lapsed provisions. And I suppose, your Honor, speaking for myself, I suppose your Honor could reinstate those lapsed provisions. Certainly the defendants who have abided by them propose to continue to abide by them, as far as I know, but the provisions on clearance and for arbitration of runs have not lapsed and are still in full effect, in order to be so continued.

ARGUMENTS ON BEHALF OF DEFENDANTS TWENTIETH CENTURY FOX FILM CORPORATION AND NATIONAL THEATRES CORPORATION

Mr. Caskey: If your Honors please, the discussion between Judge Bright and Mr. Seymour perhaps anticipated a portion of the case that I had planned to discuss because the effect of the consent decree, its history, its operation, play a very vital part in the ultimate decision to be made here.

Mr. Caskey on behalf of Defendants Twentieth Century Fox and National Theatres

The history is important because it shows that the bargain of the Government was no improvident one. For many months prior to June 1940 there had been extensive negotiations between the representatives, not only of the Department of Justice, but the Department of Commerce and the representatives of these defendants. Those issues were not resolved and the case came on for trial in June. Opening statements were made and then successive adjournments were taken for a period of five months, during which the parties literally lived together and fashioned this decree.

The Government was represented by four negotiators, including the present trial counsel. The then Assistant Attorney General, who was a self-professed opponent of monopoly, intervened, held hearings, discussions, and issued public statements. And finally, on November 14, and 15, extensive hearings were had before this Court and, after consideration, the decree was entered.

The first portion of the decree deals with certain marketing problems that had risen out of the controversy of block booking and blind buying. Those procedures had been held lawful in this circuit, but, without disputation, five of the defendants agreed to a radical change in their method of doing business. First of all, they agreed that no picture should be licensed for exhibition to any exhibitor until it had been completely manufactured, a positive print actually made. They agreed, second, that it should not be offered to any exhibitor until it had been publicly exhibited for the benefit of all the exhibitors who would come, and an elaborate system of invitations for these trade showings was set up.

They agreed, third, that they would not offer at any one time more than five of these completely manufactured trade shown pictures.

Fourth: They agreed that they would not condition the licensing of one group of pictures on another; that the exhibitor might take one and be free to reject the other.

Fifth: They agreed that in the merchandising of their short subjects, their newsreels, their western or action pic-

tures, and the foreign made pictures which they distributed, that they would not force the exhibitor to take those by conditioning the licensing of their desirable features on the licensing of shorts and news, westerns and foreigns.

And sixth, they agreed that no license agreement with any circuit should embrace the theatres of more than one exchange area.

Now, these provisions were insisted upon by the Department of Justice, and on their face, as any reading of the decree will disclose, they are permanent. They were, however, subject to an escape clause. If the Department, contrary to its protestations and publicity, did not secure a like decree against the non-consenting defendants within a stipulated period, then these five were to be free of those requirements.

Now, the Department did not make——

Judge Hand: That means of all requirements under the decree?

Mr. Caskey: No, sir, of these marketing requirements that I have just listed; that is, these six marketing requirements and only those six.

Judge Hand: All right.

Mr. Caskey: Now, the Department did nothing to bring about any trial of the action against the non-consenting defendants. Mr. Wright, did not even say "boo" to Ed Raftery.

Mr. Wright: Boo.

Mr. Caskey: But the consenting defendants did not attempt to escape from those provisions of the decree, and they have continued during these years to market their product in accordance with the provisions of Sections 3, 4 and 5. They license no picture to any exhibitor until it has been completely manufactured, until it has been trade-shown; they license their pictures only in small groups, usually considerably less than five. There is no conditioning of the licensing of one group upon another, and there is no conditioning of the licensing of features upon taking shorts, newsreels, foreign, action, or western pictures.

Mr. Caskey on behalf of Defendants Twentieth Century Fox and National Theatres

In good faith these five consenting defendants, despite the tremendous cost of doing business and the necessity of a greatly increased inventory have continued to observe the letter as well as the spirit of the decree.

Now, the next group of problems with which the decree dealt were problems which were trade practices which everyone recognized were essential in the conduct of the business, but which was alleged had been the subject of misuse or abuse and which could not readily be determined by the ordinary judicial procedure.

Now, talking about run, clearance and the practice of licensing on percentage and of entering into a contract specifying a minimum admission price, when Sections 6, 7, 8 and 10, dealing with these practices, were finally agreed to, they were agreed to in the light of the amended petition which framed the issues and which clearly show that in 1940 as well as yesterday, the Department of Justice was fully informed of all the vices that it says flows from a system of run and clearance; that the illegality was fully pleaded, was denied; and that the decree represents an adjudication on the issues made.

Let me call your attention to the specific allegations of the amended complaint: First it alleged that each theatre ordinarily plays all of the features it exhibits on the same run with the same clearance. That charge they made then they have repeated now.

They alleged, paragraph 113, that the incorporation of the provisions with respect to run, clearance and admission price had tended to stabilize the playing position and operating policies of the particular theatres from year to year.

They allege in paragraph 119 that uniform schedules of zoning and clearance are actually in effect in every exhibition territory in the United States.

They allege that the defendants have conspired and combined with each other concertedly to fix the run, clearance and minimum admission price on which any exhibitor in the United States may play.

And in paragraph 128 the whole nub of the Government's position was stated. I read it:

"The first-run exhibitor is also usually required to charge the highest admission price as a condition of securing a given clearance over subsequent-run theatres. Subsequent-run theatres could not normally play a picture so profitably at the same admission price as the first-run in view of the fact that they must play it at a substantially later date after the capacity of the picture to attract an audience from the particular clearance zone has been partially exhausted by the first run. The result is that the entire admission price, run and clearance structure of the theatres in a given town or city is subject to run and clearance terms fixed in license agreements betwen the major distributors and first-run exhibitors, and the availability to subsequent-run exhibitors of the most profitable features is determined by the manner in which the first-run exhibitor exercises his selective privilege. In recognition of this fact the producer-exhibitor defendants have uniformly refrained from operating subsequent-run theatres in towns or cities where they do not operate first-run theatres."

Now that reads just like good orthodox Wright.

And finally they say in paragraph 149c, the defendants have conspired and combined with each other concertedly to grant circuit theatres arbitrary and unreasonable clearance over competing independent theatres. As a result, independent theatres, in many instances, are unable to exhibit feature pictures until their novelty and freshness have worn off and their box office value has been seriously diminished, solely because earlier exhibition in the independent theatres would decrease the profits of a circuit exhibitor.

And there are like allegations as to the effect of the granting of clearance by an individual distributor.

Now I have adverted to these to show that in 1940 when this decree was entered there was no unexplored area. The Department was fully familiar with the effect of run and

clearance on this industry, it made these allegations and they were denied. And then what did the parties do? They entered into this agreement, approved by this Court, that run and clearance were essential, and they set up standards whereby the reasonableness or unreasonableness of the particular run and the particular clearance could be judged. They set up this arbitration system.

Now this arbitration system was prayed for, as Mr. Davis stated, by the plaintiff. I read the fourth prayer of the amended petition:

> "That a nation-wide system of impartial arbitration tribunals or such other means of enforcement as the Court may deem proper be established pursuant to the final decree of this Court, in order to secure adequate enforcement of whatever general and nation-wide prohibition of illegal practices may be contained therein."

Now it is our position that these provisions are permanent. Let me read what the Assistant Attorney General said to this Court when he presented this section of the decree. Mr. Hayes said:

> "And I may say in that connection that it has long been felt, both by exhibitors and by distributors, that their eyes, as was their duty, the complaints of explaints concerning clearance than to have the clearance fixed by some impartial arbitrator, and that is precisely what is accomplished by Section VIII. * * * Those of us who have worked on this decree after reviewing, as I said at the very beginning, the numerous industry problems in all their ramifications with the government representatives keeping constantly before there is no fairer way to handle and dispose of combibitors and the complaints of public groups, are of the opinion that the decree is a desirable forward step. We believe it will work. We believe it will produce good. We recommend the decree to your Honor."

In Exhibit 390, prepared by the American Arbitration Association, the details of the operation of the arbitral system are shown. First of all there is the complaint. A man who says that the clearance against his theatre is too long in time or too extensive in area, that he can't get the pictures as soon as he would like to have them. Then there are the intervenors, the people who currently have clearance over the complainant, and who certainly are loath to give it up. Then there are the representatives of the distributors with their books and records available for the arbitration. Then the arbitration—there are careful, patient, over-patient hearings, usually before trained lawyers, usually accompanied by an inspection of the competitive area and the theatres. There then follows the opinion of the arbitrators, many of them models of judicial writing. And if the parties are not satisfied there is the appeal, the briefs, the right to oral argument, and a complete review *de novo*.

How does the system work? Well, we have Mr. Braden's testimony to that effect. From February 1, 1941, through October 8, 1945, 416 cases had been filed, of which 343 dealt with clearance or with clearance in combination with some other portion of the decree.

112 cases were withdrawn and 21 resulted in a consent decree before the arbitrator, leaving 283 awards. In 177 cases, the decision of the Arbitrator granted the complainant some relief. In 106, denied it.

Of the 241 awards that deal with clearance, 161 granted the complainant some relief and 80 denied it.

Now this has not only been successful in its operation but it has been economical. As Mr. Davis so clearly pointed out and as the amended complaint and the consent decree show upon their face, the arbitration system was not set up as any bargain to protect us against divorcement or divestiture. It was set up with an honest purpose to solve these trade practice difficulties, and it has been supported by the distributors to the extent of expenditures of $1,347,000. And yet the average cost to the complainant who has pursued his matter

all the way through an appeal has been $48.62. We see no reason why there should be stricken down, and we think on the face of the decree that it is permanent, subject only to the power of the Court, under Section 23d, which enables any party to this decree to apply after a period of three years for any modification.

Mr. Seymour said it is impossible to state with absolute precision the legal requirements of modification. I think the law is pretty well crystallized in the two Swift decisions and in the decision in the Chrysler case. The modification must be bottomed upon a finding of illegality other than that which is said to arise from a following of the decree. In other words, it cannot be said that we are to be damned for having granted clearance since the entry of the decree, when the decree itself specifically permitted it. The Chrysler and Swift cases, as we see them, make it clear that any modification must be for the purpose of furthering the purpose and intent of the decree, and the modification must be one that does not do substantial injury to the defendants.

Now it is not a modification to change "Yes" to "No." It is not a modification to say that something which on this record, after these allegations, was lawful and legal in 1940, is no longer lawful and legal.

The remaining sections of the decree dealing with acquisition of theatres, which is Section 11, and the prohibition against the Government bringing this or any other action for divorcement within the three-year period, have expired. But there again, as the evidence clearly shows, there has been no program of expansion by these defendants. During the five-year period the amount of new theatres acquired has been inconsiderable, and when it was challenged by the Department of Justice a hearing was had and an adjudication in favor of the defendants resulted.

In connection with the operation of the arbitration system a great deal has been written. As I say, there have been 283 awards and many of them are quite lengthy. There have been 109 decisions of the Appeal Board and they range from eight to twenty pages.

Mr. Caskey on behalf of Defendants Twentieth Century Fox and National Theatres

When the plaintiff made an application for a temporary injunction to modify the clearance sections, counsel offered all the decisions of the Appeal Board to the District Court for its consideration. During this trial, with the spell of advocacy upon him, he has selected only 21 and they are before your Honors. You will recall that we protested their admission, suggested that they were hearsay, that they were not binding upon us, we had had no chance to cross-examine, and the Court received them tentatively and provisionally. We think they should not be used as any evidence of the facts stated therein. We think they are, of course, useful to the Court as showing how the decree has worked, how the Appeal Board has patiently and painstakingly dealt with each of the problems that has come before it, but we do not think that they are any competent evidence of the facts that are stated in them; and I emphasize that because of what, it seems to us, is a peculiar unfairness in the plaintiff's brief.

The principal decision of the Appeal Board which is recited in the plaintiff's brief as proof of something that has to do with the situation down in New Orleans, or in that vicinity, in which there was a race of diligence between two exhibitors in erecting theatres, and the complainant filed a complaint that he did not get the product which he thought he should have, and that is quoted against us by the plaintiff's counsel. We think it a little unfair that the plaintiff's counsel did not state that as to two of us, we gave the complainant exactly what he wanted, and we think the attempt to use these Appeal Board decisions against those of us who were not even parties to the decision is an inadmissible substitute for testimony.

Judge Hand: Aren't the true facts, whatever they are, to be shown by the record so far as they relate to this case? That is, through answers to interrogatories and things like that? Does this make any difference? Are you just trying to get a ruling on an exception on evidence?

Mr. Caskey on behalf of Defendants Twentieth Century Fox and National Theatres :

Mr. Caskey: Not at all. We don't want any exception at all. We are not complaining from the evidence point.

Judge Hand: You are merely confirming the correctness of the new rules in that respect.

Mr. Caskey: What I mean is this: Let me put it this way. The plaintiff has avowed that it was trying a paper case; that it was not putting in any proof of specific misconduct or any proof of specific discrimination which, if it had embarked upon, it would have had to call living witnesses and subject them to the hazards of cross-examination.

Now, we say, having elected to proceed on that broad course and having announced that purpose, it is not appropriate to have just a teeny little bit of evidence of discriminatory practices through these Appeal Board decisions when what is stated is stated in an opinion that does not deal with an antitrust problem at all but with simply the the review of a business judgment.

Now, I can give you one example that I think will solve the whole matter: There is a very beautiful suburb of Boston called Winchester, and the fathers for many years kept all theatres out; but eventually they yielded, and a new theatre was built, and it was within a few miles of some eight or nine other theatres. The operator was dissatisfied with his playing time, and he brought an antitrust suit in which he alleged combination and conspiracy to restrain trade, and so forth. Under the Massachusetts practice it was referred to an Auditor, and we had the good fortune to have as Auditor the Honorable Hugh McClellan, sometime District Judge. He recommended that the bill be dismissed.

The plaintiff was still not satisfied; and as it had the right to do, went before a jury. The verdict was for the defendants.

Then and only then they filed a complaint to the Arbitration System, and the Arbitrator, freed of the legal requirements of the Sherman Act, and simply sitting in review of what the distributors had done, made quite considerable changes in the clearance that affect the Winchester theatre. And when it got to the Appeal Board, they tried their hand

at it and they set up another and somewhat more complicated system.

Now, we say that certainly, having won an antitrust suit on the very issue of whether we had conspired or combined to grant an illegal clearance, that the decision of the Appeal Board modifying the clearance at some later time is certainly no evidence that there had been any violation of the Sherman Act.

Now, in the few remaining moments which I have, I desire——

Judge Hand: I think you take this item of argument rather too seriously.

Mr. Caskey: Well, then, that disposes of it.

Judge Hand: In other words, we are entitled, it seems to me, to have a picture of what this Board that has worked very well did.

Mr. Caskey: Certainly.

Judge Hand: And not fuss too much over the details, which we should not.

Mr. Caskey: That is quite correct, sir.

Judge Hand: I do not believe the Government would expect us to. They called attention to some features in the picture, and you could call attention to others.

Mr. Caskey: But what I am saying is, sir——

Judge Hand: We are not accustomed to reading any more, in suits of this kind, than we have to, or in ruling out a lot of stuff in evidence. It does not do any good. If it does not take too much time, in it goes.

Go ahead.

Mr. Caskey: Now, in the second part of my argument I want to discuss very briefly the position of Twentieth Century-Fox and its theatre-operating affiliates in the industry.

It is no longer necessary to discuss the problem of individual monopolization. Twentieth Century-Fox produces something like 9 per cent of the feature pictures produced in

this country and distributes a somewhat lesser percentage of those which are distributed. Revenue from all the theatres in the United States including its own is less than 15 per cent of the total revenue. While, naturally, we urge that it produce the good pictures, obviously it does not produce all of the good pictures. It has no monopoly position.

So the plaintiff is compelled to resort to a claim of combination which, as has been stated yesterday, means agreement. Now, it does not mean agreement in the sense of a signed document, but it means agreement in the sense that a plan or arrangement has been assented to, and it means agreement in the sense that there is some defined program. Certainly, an agreement among these defendants to sell to each other whenever they wanted to is no such agreement. It seems to us that the only agreement which could possibly be spelled out of the claims of the plaintiff is an agreement that we will deal with the other four companies wherever they are located, and that we will refrain from dealing with others in those situations.

Now, of that agreement there simply is no evidence and there are no facts from which the inference of any such agreement could be made. The market which we have been asked to test is this rather artificial market conceived by drawing a line under a hundred thousand and taking the 92 cities which were above it. Obviously, some of those cities are not key cities in any commercial sense. Obviously there are other cities of smaller population of greater importance. But taking what was tendered, we find first of all that Twentieth Century-Fox has an interest in theatres in only 17 of those cities, and that includes Philadelphia where its theatre during the 1943-44 season, for which you have statistics, was operated by Warner Bros. Of course, in those cities, to the extent that the screen time will absorb the product, National exhibits the pictures of Fox, and Fox does not license them first run elsewhere. But here in New York where the Roxy Theatre is unable to show them all, then Twentieth Century pictures are licensed to independent first-run the-

atres, and often in direct opposition—that is, often an independent on Broadway will be exhibiting a Fox picture at the same time that another Fox picture is being exhibited in the Roxy Theatre.

In four of the cities there are no affiliated theatres at all, and we deal as we must with those who have the independent first-run theatres in those communities.

So that is 21 cities, leaving 71. If the plaintiff's fundamental basis has any validity; if this cross-licensing or diagonal-licensing or sharing screen time, or whatever it is, is to be sustained, we should find that in those 71 cities in which there are affiliated theatres, Fox deals with them and refrains from dealing with others.

Now, the fact is to the contrary. In 17 cities in which there is an affiliated theatre of one of the defendants, Fox deals with an independent; and in 6 cities in which there are affiliated theatres of two or more defendants, Fox deals with an independent. So that there are 23 out of the 71 cities in which there are affiliated theatres but where Fox has chosen to deal with some other exhibitor, an independent exhibitor, and for the reasons set forth in Mr. Kupper's testimony.

Now when we turn to the National situation we find exactly the same lack of pattern. As I have said, during the year for which the statistics are available, the Fox Theatre in Philadelphia was leased to Warner's. But taking the other 16 cities, what do we find? The first thing we find is that in 11 of them National Theatres does not license Warner first run product at all. In 11 out of 16 we license no Warner product. In 5 out of 16 we license no Loew product. In 6 we license no Paramount product. In 8 we have no RKO product. In 11 we do not have Columbia. In 9 we do not have Universal. And in 7 we do not have United Artists.

Now, we appreciate that in some of these cities the reason that we do not have the product of the particular distributor is because it has a theatre in competition with ours. But our point is that there simply is no pattern, there is no relationship between what Twentieth Century-Fox licenses the

other four companies and what National Theatres licenses from the other four companies. There is no way in the world in which you can sit down and write out what this combination and conspiracy is, because the conduct of the parties is so at variance with any preconception as to show that there are no factual bases for any inference or conspiracy.

We put on, by stipulation, the testimony of the managers of the five principal divisions of National Theatres. They testified, uncontradicted and in detail, not mere generalizations, that in the licensing of motion pictures they are motivated solely by the purpose to secure the best pictures they can; that the fact that the particular distributor with whom they are dealing has or has not theatres is of no concern; that in licensing pictures for their theatres, they are not the least concerned, or informed, indeed, as to the distribution problems of Twentieth Century-Fox; that their theatres, which they license pictures for first-run, are either the best or comparable to the best in the community; that they are in direct and vigorous competition in every one of the 17 cities in which they operate except one, which is Wichita, Kansas, with other first-run exhibitors, and in Wichita they are in direct competition with a considerable number of other theatres.

I want to speak only a moment about the so-called pools or arrangements between two defendants. National has an almost irreducible minimum.

As the testimony shows, many years ago Loew's leased a theatre in Los Angeles and a theatre in San Francisco to Fox West Coast Theatres. That was before Twentieth Century-Fox had any interest whatever in that company. It had continued to lease and still operates those theatres under a flat rental. Certainly there can be no intent to eliminate competition in Los Angeles or San Francisco by purchasing stock in 1928 in a company which in 1924 had leased a theatre from Loew's.

The San Francisco situation has been fully explained by Mr. Seymour. There was a deal which was not negotiated by

theatre men. It was negotiated by two sets or two groups of trustees in bankruptcy and approved by two different bankruptcy courts. Of course, that does not give immunity under the antitrust laws, but I do think the two distinguished District Judges would be somewhat surprised to have it charged that they were attempting to restrain competition.

Then in Kansas City what is the situation? Years ago the so-called Junior Orpheum Circuit built the Main Street Theatre in Kansas City. They spent a lot of money, but they built the theatre off location. And when vaudeville ceased to be profitable, RKO was unable to successfully operate it. For a very few months in 1936 there was a playing arrangement in Kansas City in which a number of theatres were operated together. As a result, there became available for the Main Street Theatre a choice of the product of many distributors, but the result was unsuccessful. RKO gave up the theatre, that is, the lease on it, and it reverted to its owners, and that was the end of it, and the theatre was closed. But in 1942 there was a war on, and there were boom times in Kansas City, and a real estate agent came to Fox and said, "I can get you the Main Street Theatre—the fee of it—very cheaply." So National said, "Well, if you can do that, of course we will take it." And the agent had spoken without authority and we ended up owning one-half of the theatre, an undivided one-half interest and somebody else owning the other half. We immediately commenced a suit for partition and when the answers in the suit for partition came in, we learned that the people who had bought the other half—and I will not characterize their action—was RKO.

I do want to say a few words about Mr. Wright's conception of the real estate law in Missouri, which is about the same as that of his antitrust law. In Missouri, when you have a partition suit of a building, you do not cut it in half. A master in chancery is appointed and he takes sealed bids

from each party, and then they have a court hearing as to whether he shall sell it to the higher of the sealed bids from the two parties, or shall sell it at public auction and divide the proceeds among the parties. So I assure Mr. Wright that there will be no surgical demolition of the Main Street Theatre because of the partition suit.

I do not propose to argue the interstate commerce point, because it is wholly immaterial. I do point out that the theatre was closed and had not been operated for several years prior to the time when Fox acquired an interest in it, and that there is no kind of arrangement, agreement or understanding at all with RKO.

Finally, I want to come to these so-called closed towns. I do not want to repeat what Mr. Seymour said. Our situation is this: National has the only theatre in 16 towns. They have an average population of less than 5,000. We haven't got any quite as small as Smakover, but I will tender Delta, Colorado, as a fair example. We have two in California, five in Colorado, one in Illinois, one in Montana, one in Nebraska, two in Wisconsin, and four in the Michigan Peninsula. That is 16 local monopolies. We paid, during the 1943-1944 season an aggregate film rental to all distributors, including Fox, of $25,000,000. I estimate that the film rental paid by these 16 theatres did not exceed $25,000. It is an infinitesimal fraction of one per cent. The ownership of these closed towns certainly gives National Theatres no economic power which enables it to discriminate or to compel anybody to do anything they should not do.

Finally I come to this issue of discrimination. We say that however broadly the record may be construed, whatever may be to this Court's conception of discrimination, whether it is discrimination to sell to one man for five dollars and to another for six, which we think is not, but however the word "discrimination" be construed, there is not one sentence in this record that National Theatres Corporation has been guilty of any act of discrimination against anyone. There

is no evidence that National Theatres in the operation of its motion picture theatres has ever licensed a single picture which it did not need. There is no evidence that the admission prices which it charges the public are high or too high and have kept anyone from seeing any picture. There is no evidence that any motion picture produced anywhere has been excluded from the screen. There has been no act of engrossing. So we say that failing proof of combination, there have certainly been no acts of monopolization.

Argument on Behalf of Defendant RKO

Mr. Leisure: May it please the Court, the general proposition of law and many questions of fact common to the five individual defendants have been so ably covered by my distinguished associates, that I will confine my remarks to the evidence particularly affecting RKO.

The Government charges that each of the integrated defendants is in and of itself a combination in restraint of trade. There is also the charge that certain trade practices are illegal per se, but I believe there can be no doubt that the main charge against the defendant I represent is that RKO has knowingly and wilfully agreed to enter into a combination and conspiracy with the other integrated defendants to unreasonably restrain interstate commerce in the distribution and exhibition of motion pictures.

I come, therefore, directly to that point. The Court will find no evidence of any such combination and conspiracy in this voluminous record. The Government tendered no testimony or presented no injured parties for cross-examination in support of any such charge.

In respect of this charge, the Government has pitched its entire case upon the single contention that the course of dealing between the five integrated defendants presents evidence from which this Court could and should find evidence of discrimination.

As Mr. Davis pointed out in his admirable statement of yesterday, so sure of his position in this respect is counsel for the Government, that he passed over all such details as proof of the charges made, and he has advised this Court on the very face of his brief that the only matter with which it need concern itself is the nature of the penalty which he seeks to guide the Court in meting out to these defendants.

If I can but make clear what RKO's dealings have been with these other integrated defendants and the reasons for those dealings, I have every confidence that this Court will be fully able to apply the law governing relief without any help from either side in this litigation.

Specifically, the course of dealing that the Government complains about is that which the Government terms "cross licensing". Because of this course of dealing between the integrated defendants, Mr. Wright charges that they have agreed to favor each other in the selection of their first-run outlets to the exclusion of the so-called independents.

Now, does RKO favor affiliated theatres and discriminate against independents in the distribution of its priduct? Well, if it did, one would expect to find in this record evidence that RKO in some way sought to exclude the independents, or, at least, made some appreciable difference between the independents and the affiliates in the licensing of its film to them.

The record discloses no such discrimination. It shows something very different. It shows the fact to be that out of this test group of pictures for the 1943-44 season, in the very cities selected by the Government, both the 92 cities and those having a population of 25,000 and over, approximately 50 per cent of RKO's product was to be found in the affiliated theatres and approximately 50 per cent was to be found in the independent houses. The exact figures are: 47% in the independent houses and 53% in the affiliated houses; in other words, a variation of only 3 per cent on either side of the line from an absolutely equal division between the affiliates and the independents. And

this figure becomes even more striking when we consider that the Government claims that 71 per cent of the first-run theatres in these 92 cities are owned or operated by the integrated defendants.

Now, quite aside from this showing as to RKO's product in these 92 cities selected by the Government, let us look at the cities. Did RKO discriminate against the independents in those 92 cities? The record does not show any discrimination. It shows that in 27 out of the 92 cities, RKO owned or operated its own theatres. There is no discrimination in cities where RKO operates and shows its own pictures in its own theatres.

In 24 out of the remaining 65 cities, RKO licensed all of its product to the independents. I suppose even Mr. Wright would not contend that there has been any discrimination where RKO licenses all of its products to the independents.

In six of the remaining 41 cities, RKO divided its product one-half to the independents and one-half to the affiliates; so there is no discrimination in those cities.

In the remaining 35 out of the 92 cities RKO licensed its product to the affiliated theatres, but the record shows that there was no discrimination against the independents in the selection of these affiliated theatres. In fact, the evidence is not even disputed that these were the best available theatres in this vicinity. Specifically, the record shows that in more than 75 per cent of those 35 cities the affiliated theatres were at least 22 per cent larger than the independent theatres, and in many instances from 70 per cent to 190 per cent larger than the independent theatres. The record further discloses that the first run of affiliated outlets selected by RKO averaged 16½ per cent more revenue than the independent outlets averaged.

Now our general sales manager, Mr. Robert Mochrie, testified that in many instances RKO had actually taken its product away from affiliated theatres and licensed it to independent houses. Buffalo, New York, Salt Lake City, and

Oklahoma City were cited as specific examples. The Government did not seek to dispute this testimony either on cross-examination or by calling witnesses of its own to contradict it. Neither did the Government seek to show that RKO had ever taken product away from independent houses and licensed to competing affiliated theatres.

As was said by Mr. Whitney Seymour this morning, with the industry that counsel for the Government have shown in this case, I submit that such testimony would have appeared in this record if an army of United States Government accountants had been able to find a single instance of any such discrimination on the part of RKO, agreed to, or as an isolated transaction, tacit, or in writing.

Now there is also the charge in this case that the integrated defendants have agreed to favor each other in respect of the length of playing time and as to the quality of pictures licensed to the independents. Mr. Seymour I thought covered that beautifully this morning from the general standpoint. Let me be specific one second, and I can leave that part of my argument completely out, because it has been covered.

Here also the Government used as its test the first block of pictures for the 1943-1944 season. As to whether RKO did discriminate against the independents in playing time, let me point out to the Court what happened to that first block of pictures. The best picture in the block averaged six days in the affiliated theatres and it averaged six days in the independent houses. The next best picture averaged five days in the affiliated theatres and it averaged five days in the independent houses as well. The next picture averaged four days in the affiliated theatres and it averaged four days in the independent houses as well.

Now what happened to the two least successful pictures, which accounts for the entire block of five pictures? Were they palmed off on the independents for longer playing time, as Mr. Wright suggests? Not at all. The record shows that they averaged four days in the affiliated theatres, but they

only averaged three days in the independent houses. In other words, they were actually given longer playing time in the affiliated theatres than they were in the independent houses.

The record shows that the affiliated theatres licensed only 55 per cent of RKO's best product.

I have already pointed out that they licensed 53 per cent of all the product. I think a variation of two per cent is *de minimus*. Frankly, I have no fear that this Court will find that that a variation of two per cent in a nationwide distribution is the character of evidence which will support an inference of collusion.

Now if the Court please, those are the important charges of discrimination made against RKO as a distributor. I come now to the charge that RKO as an exhibitor has discriminated against the independents.

There is no evidence of any such discrimination in this record. The Government seeks to explain the absence of any proof of this charge by the suggestion in its brief that the integrated defendants naturally favor each other's product. What does the record show? Let's see whether RKO just naturally discriminated against the independents.

A nationwide survey of all RKO theatres during this 1943-1944 season shows some very interesting things on that:

It shows that RKO exhibited nationwide more Republic features than it did Loew's features.

It shows that it exhibited more Monogram features than it did Paramount features.

And it shows that it exhibited more Universal features than it did Fox and Warner features put together.

In other words, less than one picture out of every three pictures came from the other integrated defendants.

Now that is the record if your Honors please. I submit that such a record not only fails to support any charge of discrimination but it demonstrates that RKO could not have been a party to any understanding or agreement to injure the independents either in the distribution or in the exhibition of its pictures.

Mr. Leisure on behalf of Defendant RKO

I now come to the second general charge in this case and that is the charge that RKO is in and of itself a combination in restraint of trade. As this Court well knows, the Supreme Court has consistently held that the legality of any consolidation turns upon two important and main question,—first, its purpose, and second, the effect of its operations. I have reference to the Appalachian Coal case, the American Tobacco Company case, and the Standard Oil case.

Now, RKO's purpose was clearly shown in the record. Coming into a very highly competitive field was its purpose, and that is shown in the record, and I can save thirty minutes of the Court's time by not reviewing that because it is very clear that it's purpose was to come into the competitive field of producing, distributing and exhibiting motion pictures.

So coming down to the effect, what has been the effect of RKO's integration?

Well, as a producer, it has expanded from an almost nonexistent competitive factor to one of vigorous competition to the other four integrated defendants. It has neither the power nor the will to exclude other producers of motion pictures. The Government has not even suggested that it has such power or has even attempted to exercise it.

Now, what about the effect of its operations as a distributor? I submit that the record is clear. RKO has never attempted to exclude the independent producers. On the contrary, as the youngest and the smallest of the integrated companies, it relies upon the independent producers for more than 30 per cent of its film revenue.

The testimony of its president, Mr. N. Peter Rathvon, and its general sales manager, Mr. Robert Mochrie, remains unchallenged and uncontradicted in the record that RKO has always afforded a substantial outlet to the independents for the distribution of their product.

For a period of nine years down to the close of 1944, RKO has depended upon the pictures of independent producers for approximately one-third of its gross revenue.

Now, finally, what has been the effect of the operations of RKO as an exhibitor? Well, has it shown any tendency in this field in the direction of monopoly, as Mr. Wright suggests? It owns 106 theatres today. It has 50 less theatres today than it had when it entered the motion picture field in 1928. Does that look like any desire to monopolze motion picture theatres? Either RKO has no such desire as has been ascribed to it, or it has been missing some wonderful opportunities during the years that these theatres were being built.

Neither the size nor the competitive strength of RKO indicates any tendency in the direction of monopoly. As a producer it produces less than 8 per cent of all the feature motion pictures released in the United States. As a distributor, it distributes approximately 8 per cent of all the feature pictures distributed in the United States. As an exhibitor, out of every 1000 motion picture theatres operated in the United States in 1944, RKO operated less than six theatres. If there is such a thing as evidence, we think that this record clearly shows that the formation and present operation of RKO promotes, rather than restrains, competition.

I respectfully submit that every charge that RKO has entered into a combination and conspiracy with the other integrated defendants collapses under the impact of the facts in this record. The record stands unchallenged that RKO without its theatre holdings could not have emerged from receivership in 1940, or have expanded its production in 1942 and 1943. Therefore, it cannot be disputed that the mere fact of integration has enabled RKO to appear today as a substantial competitor in the motion picture industry.

The operating efficiency of the showcase theatre as a means of exploiting and advertising our product stands unchallenged in this record. The Supreme Court has persistently held that an efficient method of marketing a product should be encouraged and not condemned.

There is no evidence of predatory practices on the part of RKO such as led the Supreme Court to strike down the

combinations condemned in the Interstate, the Crescent, and other cases relied on by the Government in this case.

There is no evidence that RKO anywhere or at any time either coerced exhibitors to sell their theatres to it, or in any other manner impaired their fullability to go out and erect or buy or get all the theatres they wanted to get.

There is not even any attempt to bring out any such facts of predatory practices against RKO which runs through all these other cases.

And lastly, I submit that this record is unique it its total absence of any evidence to show that any person has ever been injured in any respect by RKO, under any of the charges contained in this complaint.

Judge Hand: We will take a recess now until 2.15.

(Recess to 2.15 p.m.)

AFTERNOON SESSION.

ARGUMENT ON BEHALF OF THE WARNER DEFENDANTS.

Mr. Proskauer: May it please your Honors, for the better part of a day I have heard my colleagues on this side of the counsel table indulge in a process of what I personally regard as murder as a fine art on the Government's case, and it might occur to your Honors that in view of that demolition, I might fairly temper the wind to the shorn in court and say the rest is silence. But I have a definitive objective in speaking. I am going to indulge in the task of trying to find the pattern in the Government's argument and follow through the labyrinth the maze of obscurities and contradictions which have characterized the presentation, in the endeavor to demonstrate finally to your Honors that there is no cause of action proved here.

First, I direct your attention to the question asked by Judge Bright this morning which related to the power of this Court with respect to the consent decree. First let me

say that it is obvious to your Honors that none of these defendants seek to avail themselves of the three-year escape clause. We have abided by the provisions of the consent decree from which we had a right to escape in view of the Government's inaction which reached its climax this morning when Mr. Wright finally got himself to say "Boo" to the three non-integrated defendants. So that if your Honors see fit to continue those provisions it is my submission that you have a perfect right to do that without any finding of law violation against us.

Second, with respect to the arbitration provisions I take it that a court always has a reserved power to perfect a plan formulated in a consent decree, and if the Government, as I shall point out later in another connection when I come to speak of remedy, had seriously undertaken to try to meet any criticisms suggested either by the Appeals Board or by the Court in the details of the arbitration provision, and if this Court should believe that there was anything that could be done to make that machinery even more effective than it concededly has been in the administration of this industry, you will find us ready and willing to consider, when the opportunity is given us, any suggestions that may be made in that regard.

Beyond those two things, which I think are within the reserved power of the Court—and I am speaking for myself alone—the effect of this consent decree is to my mind, and I read a few words from the Swift case (286 U. S. at 119):

> "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions, should lead us to change what was decreed after years of litigation with the consent of all concerned."

Before you can do what Mr. Wright has suggested, throw this consent decree in the waste basket, I suggest that in respects other than the two to which I have referred, you must find a clear showing of grievous wrong evoked by new and unforeseen conditions. So much for the consent decree.

Has there been a grievous showing of wrong? And from this point on, I shall argue as though there had been no consent decree. I grasp the nettle and take the challenge which the Government has offered.

There has been a curious inconsistency in the presentation of the Government's case. One aspect of it sticks out like a sore thumb when you read their brief. "Collectively" is the word they use, and there they base all their claim for relief on the assumption rather than the proof that "collectively" means conspiracy, an agreement to restrain or monopolize.

And at various times during the trial the Government has offered the issue on that phase of the litigation. At other times, and particularly in his summation yesterday, Mr. Wright discards that and he says, "We are not relying on proof of detail or specific agreement or on inference," but in somewhat high sounding phrase he says, "We rely on the principle of law that the integrated industry is illegal per se." I wont burden your Honor with reading from his oration of yesterday.

At one time during this trial, when he evidenced such a theory, there was a spectator in this courtroom who uttered what I think is the most significant bon mot I have heard about this case. There has been great competition among defense counsel to use that on argument. My colleagues finally generously conceded that I had the right to use it because the spectator was my son-in-law, a young Naval officer. When he heard Mr. Wright, and I asked him how the argument appealed to him, his answer was, "It seems to me that the Government's charge is that the moving picture industry is monopolizing the motion picture business," and that is exactly what it comes down to.

And I desire to examine it objectively, and I hope fairly, to demonstrate that in that presentation of his case Mr. Wright is treading on quicksand. What is this talk about illegality per se? Well, the first thing he objects to is integration. There is no harm in integration as such. I read two statements on integration, one from Mr. Justice Holmes,

"The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree. It is as lawful for one corporation to make every part of a steam engine and to put the machine together as it would be for one to make the boilers and another to make the wheels." (227 U. S. at 217-218). And then in another case, which approximates very closely to this case, the Eastman case, where the Eastman Company, making almost all of the film that is used by motion picture producers, sought to go into the business of producing motion pictures, Judge Hough, than whom there was never a greater mind to sit upon this Court, used these words (7 F. 2d at 996):

> "Since corporate power exists, it was not and is not unlawful for Eastman Kodak Company to equip itself for, or enter upon, the business of making pictures, but it was and is unlawful for the Commission to order that company to divest itself of the factories and laboratories so lawfully acquired. * * * it is fundamental just now in this country that competition is holy * * *"

It does not follow from what I have thus far said that there are not forms of integration which are illegal, and therefore I think my next step should be to consider with your Honors what is it that makes integration legal or illegal? I find the complete answer to that in one case. That is the second Standard Oil case, the one which had to do with the attempt of the Government to prevent consolidation between the Vacuum Oil Company and the Standard Oil Company after the decree of dissolution against the Standard Oil Company had been made (47 F. 2d 288). And I believe I can help your Honors if I will run through that opinion and approximate what it says to the facts which are here before you.

First: "The industry, as a whole, is thoroughly into the stage of integrated companies," says the Court, which means that such a company owns or controls production, pipelines, and so forth.

That is true here. This industry is in a thoroughly integrated stage where for many years companies, for reasons which have been described to you in the testimony, have produced, distributed and exhibited motion pictures.

What is the criterion by which that should be judged? The Court says that "the superior business position of such an integrated company is evident." Mr. Wright seemed to argue yesterday that if we made an appeal to you to take into account the valid business considerations which prompted integration, that we were asking you to say that a course of conduct was legal merely because it enabled us to make money. I repudiate that argument which he puts into our mouths, but I do say that as Judge Hough pointed out further in that Eastman case, competition is not impaired; it is increased by integrations which make for business efficiency; and unless you can show that by reason of that integration there has been either by predatory practice, by invidious and planned and systematic discrimination, an exclusion from the market of people vi et armis, this Court says that the fact that integration gives a superior business position is a factor that you have a right and a duty to take into account.

What is the next thing that the Court said in that case? I read these words: "It is not of their making and is beyond their control. It is a business current which they cannot successfully oppose. It cannot be ignored in judging their actions and the results therefrom."

That is this case. How did these companies come to be integrated? You have heard the story from my brother Seymour. The independent exhibitors ganged up on the old Paramount, and Paramount met the ganging up by buying theatres and running them itself.

You have heard the story of how Warner got its theatres. We got our theatres because as a struggling infant, young company, we were being throttled in the production of talking pictures and sound films by the great companies which some of my brothers here represent. And we wanted—and I ask you to read the story both in the testimony of Mr.

Keough and in the testimony of Mr. Harry Warner—we wanted and bought theatres for the purpose of enabling us to produce sound pictures which, except for our ownership of those theatres we would have been wholly unable to produce. So I give you, therefore, the second parallel. It is a business current that cannot be ignored in judging our actions.

What is the third consideration? The Court says: "From the above it is clear that there are sound business reasons for this merger which are entirely sufficient and are wholly unconnected with any design to create a monopoly."

That is this case. Certainly it would be piling Ossa on Pelion for me to repeat at this stage of the argument the business reasons which have been developed here, valid business reasons, harming no one, for the integration of this industry, and which have not anything in the world to do with monopoly or restraint of trade; and I shall come to that phase of this by and by.

Then there is another and somewhat more incidental phase. It was developed in that Vacuum-Standard Oil case that those companies were engaged in a foreign business, and the Court used these words, strangely and prophetically applicable to this case: "The plaintiff objected"—that was the Government—"to all evidence as to foreign business" and it said that "the act does not govern foreign trade. We cannot agree. While, of course, the act is not designed to have extra-territorial effect, yet that does not render this evidence immaterial. We do not judge violation of the decree by the effect of the merger upon foreign trade, but the business of each of these companies is a unit, and each has an important foreign trade as an integral part of that business. This is so because the industry is not a local nor even a national matter, but it is world-wide, because there are various companies engaged in it, the trade of which is world wide, and "because the tendency in the industry is to aspire to and to acquire worldwide trade."

And the importance of that I think has not been sufficiently emphasized in this case. The evidence is that for the most part these companies would not break even if it were

not for their foreign business. And how do we hold that foreign business? We hold it because we make the best pictures and at this moment we are fighting with our backs to the wall to hold it against discriminatory laws which are being enacted in Europe. And strike down that profit which comes to us from the ownership of theatres that enables us to pay a million, a million and a half, and two million dollars in the production of the great pictures and you deprive not only us of that foreign market; you deprive this country of that foreign market. And at every stage of what I am saying to your Honors I am going to ask you to observe that I take Mr. Wright's criterion of the public interest. The public interest is an essential criterion in the determination of this case, and it is the uncontradicted evidence that to strike down the integration of this industry is to deprive this country of a return of millions of dollars, many millions of dollars, that come in here every year in return for nothing more substantial physically than a few sheets of celluloid.

Mr. Wright: Where does that appear in the record, Judge?

Mr. Proskauer: Well, Mr. Wright, I am not here under cross-examination. You will find the testimony in Mr. Harry Warner's testimony, and I cannot give you the page at this moment, and you will also find it in Exhibit W-5. And it would give me great pleasure if you asked me that after I finished.

Mr. Wright: I am sorry, but you have my record.

Mr. Proskauer: If you want your record, you can have it. I am using this record for the most useful purpose it has ever been put to. Do you want it back?

Mr. Wright: I would like to look at it.

Mr. Proskauer: You have said your "boo" to me. Now let's go on. Take it all.

Mr. Wright: I hate to interrupt you, Judge.

Mr. Proskauer: Nothing you can say will make me cease to love you even though I despise your argument.

Mr. Proskauer on behalf of Defendant Warner

I am sorry for the interruption, your Honors.

I want to go ahead with that case, showing always the parallel between the integration there specifically sanctioned by the Court and the integration which we have here under attack. Competition? What the Sherman Law does is to forbid unreasonable restraints on competition, and this is what that Court said:

> "The round situation is that while Socony was formerly the thoroughly dominating concern in this territory, and while it still has more business and outlets than any other company therein, yet competition of all kinds and in all localities has entered and thriven and is participated in by rivals ample able to take care of themselves."

Whether you think of Warner Bros. alone or Warner Bros. as a link in this imaginary chain of five integrated defendants, that is true in this case. It is true in every phase of this case. There are, as I remember the figures, and I state them subject to immaterial correction, approximately five thousand more independent theatres in this country than there were in 1935.

Warners have not increased their theatres. Loew's and RKO have not increased their theatres. Paramount has increased only by that device that you know of, the so-called partnership with people all over the country. Has anybody come here to say that there isn't ample competition in the growth of theatres—independent theatres—in the exhibition field? In the production field?

We have Mr. Wright's concession that there is no monopoly in production, but I am not content to rest on that concession. I am inviting your attention to the evidence which shows the growth of these three little fellows over there and of P.R.C. and of Monogram, and I quote Mr. Wright substantially when I say that he conceded that no

man who had the ability to produce a decent picture had the slightest difficulty in having it exhibited.

If you challenge me on that, Mr. Wright, I will find it.

Mr. Wright: Yes, I do. Where is that?

Mr. Frohlich: Montague's testimony.

Mr. Proskauer (Reading): "I suppose it is perfectly clear that anybody who has talent and who can make a successful picture is in its intense demand, and that all of the people who own theatres are anxious to have those people make pictures and get their pictures distributed." (R., p. 1949).

That is what I am referring to, Mr. Wright, and I think I fairly paraphrased it, and I don't wonder that you express surprise here at the fact that for once you did make an absolutely clear concession of an indisputable fact.

And I should like to be free from that kind of interruption. I am not accustomed to misquoting concessions or testimony.

There too, as here, the integration related to a business that controlled the ultimate retail outlets—some of the retail outlets, just as here, where we own some of the theatres that are the ultimate retail outlet to the public for the exhibition of these pictures.

Intent? Let's see what intent has got to do in determining whether integration is illegal *per se*.

"There is no direct evidence in this record of such an intent to restrain commerce." I repeat, there is no direct evidence in our record of any intent to restrain commerce. "The only direct evidence is to the effect that the intent and purpose of this merger is to meet the normal and natural business interests of the two companies brought about by the development of, and the changed competitive and business conditions in, the industry." That, I submit, is a fair statement of the evidence of all the defendants' witnesses in this case, uncontradicted and unchallenged; and while I am not unmindful of the observation made by Judge Hand during this trial that a court was not going to be too much influ-

enced by general denials in abstract terms by officers, I advance for your consideration the suggestion that you cannot ignore those denials, and that positively instead of negatively they are entitled to the very greatest weight when they are fortified by the mass of detailed and specific evidence adduced here to which it will be my privilege in a moment to advert.

Lastly, what is it in its effect on restraining commerce that makes an integration legal or illegal?

Says the Court, "The Supreme Court has construed the purpose of the Act to be to prevent monopoly by preserving that character and degree of competition which will prevent monopoly. This has been variously expressed as 'undue' restraint or 'unreasonable' restraint of trade or of commerce." And then it quotes from a dissenting opinion of Mr. Justice Holmes with approval, this phrase:

"This idea has been succinctly expressed by Justice Holmes as 'a combination in unreasonable restraint of trade imports an attempt to override normal market conditions.'"

We have attempted to override no normal market conditions, as I shall prove when I come to consider the second phase of this case.

Why does Mr. Wright resort, in the last stages of this case, to a return to a somewhat ecstatic amorphous dissertation on trade practices of integrated industry? Judge Hand during this trial referred to a book, "The Age of Jackson" where everybody thought everything was a monopoly, and it is that kind of ecstacy which seems to pervade the thinking of those who stay a long time in the Antitrust Bureau. From that same book I culled a statement and put in my brief a phrase, "A doctrinaire preference for deductive logic over facts."

When you consider that first horn of the dilemma on which I am seeking to impale the Government, namely, this general idea that there is something illegal *per se* in integration, I believe you will come to see that that aptly describes

the approach made here yesterday in Mr. Wright's summation.

Why does he do that? He does it because he has realized the breakdown of the Government's case on the other theory he advanced and which he bases on the uses of the word "collectively." And at the risk of some repetition, which I will reduce, I assure your Honors, to the minimum, I desire to examine what the evidence here is to sustain the use of that word "collectively" in its legalistic sense, its legal sense; namely, of a conspiracy. And I am going to try to put the case to your Honors, not repeating, but referring to the factual statements that have been adduced by my colleagues, in an integrated hole. I am arguing to the fact finders now. You are my jury.

What is the evidence of collectivity? Let us just see. The suggestion is made that we are engaged in a conspiracy. There is no direct evidence of it, as everybody has conceded. What are the facts from which he endeavors to infer it? First, it is conceded that there is no monopoly with respect to production. Second, the concession that I just made from Mr. Wright has been made. Third, and I refer again to the public interest, it is conceded that every member of the public can see every picture, no matter how great or expensive, for a trifling admission cost, if he is willing to wait. If he wants to see it right away quick, he will go to one of the big, expensive theatres and pay 75 cents or a dollar or more to see it. It is conceded, and I measure my words when I say "conceded", that there is profound competition among the defendants for film revenue and the box office dollar. And Judge Bright asked a question yesterday which sticks in my mind with reference to the proof on that subject. Could you have any better proof of it than the admitted fact that each one of these eight defendants maintains a distribution system at the expense of millions and millions of dollars for each one of them? Going out, fighting one another, to sell their pictures—and we sell ours singly—to sell their pictures

to the 18,000 theatres in this country, of whom over 15,000 are absolutely independently owned? Why do we engage in that competition? We engage in it because we could not live without it.

In normal times, when there is not so much money going around that enables the economically lower strata to go to the more expensive theatres, which are largely owned in some of these cities by the defendants, 61.6 per cent, if I remember the figure correctly, of our revenue comes from theatres wholly unaffiliated with any one of these defendants; and it is in the area that we are spending a sum which I estimate as about 30 per cent—cost of distribution—30 to 40 per cent of our film revenue. How? In conspiring with these other people? Not at all. In fighting the life out of them to get the last dollar of revenue from these independent theatres throughout the country.

Now, let us take up, after registering those indisputable facts with you, what the Government thinks it has adduced. They say we own a large percentage of the theatres. Well, I might reply to that, your Honor,—so what? But the fact is that we operate Warner theatres first run in only 28 of these cities. In 16 of them we are in competition with independent first-run theatres and in 10 more with the first-run theatres of other defendants. That fact standing alone has no legal significance. It would have significance only if it could be brought into alignment with a combination or conspiracy which could link us up with the other defendants as being guilty of exclusion.

Now, they say, "But you license a large percentage of your first-run pictures to affiliated theatres." Again I suggest—so what? These defendants own the show theatres. You have heard the showplace argument for the ownership of those theatres. Public interest? Public interest is served by it. The publicity that they get from those first-run exhibitions work advantageously right down the line to every subesquent-run exhibitor.

Mr. Proskauer on behalf of Defendant Warner

But let us take Warner's situation—and I am going to give you very few figures; I know they are hard to carry away, and they are on this brief. But take Plaintiff's Exhibit 428. It shows that independents were Warner's regular first run accounts in 24 cities and that there was independent first-run competition in 31 different cities, 16 where Warner's licensed its own theatres and in 15 cities where it licensed a theatre affiliated with another defendant. In 55 of these 92 cities there was independent first-run competition, and with negligible exception, in every one of the others there was bitter first-run competition between the defendants themselves.

I am not going to give you, with your permission, an exhaustive discussion of this evidence. What I am really doing is to try to give you the will to decide based upon this demonstration on our brief, which I think is unanswerable, factually, on the question of drawing any inference of conspiracy or agreement either to monopolize or to restrain.

Now, I proceed rapidly from that point of view, skipping a number of the considerations to which I direct your attention on my brief; but I will give you one figure. It is estimated that the total box-office receipts in this country are $1,350,000,000 a year. It is shown by the interrogatories that the box-office receipts of all these defendants collectively —I will use—"collectively" for once—is $460,000,000 a year. The excess of revenue of independently-owned theatres over affiliated theatres is approximately $900,000,000 out of a total of $1,350,000,000. That does not look very much like a very effective conspiracy to restrain; and while we may be guilty of some minor offenses, of which I am not aware, I think nobody will claim that we are lacking in business acumen; and if we wanted to suppress we have done an awfully bad job.

Now, here is an amazing contention of the Government's: Each defendant has discriminated against a small independent exhibitor in favor of affiliated and unaffiliated circuits. So what? I do not admit the fact. I am not going to repeat

the argument made here by Whitney Seymour this morning, which showed the enormous advantages sometimes given to the small exhibitor; and you will find in my brief a calculation with shows that percentagewise the small independent exhibitor is paying less for his film than these big circuits. But let me pass that and assume that we were discriminating against small independent exhibitors in favor of affiliated and unaffiliated circuits. I have never known that it was a violation of the Sherman law to give a large customer an advantage in trading over a small customer. I have never known that it was regarded as a restraint on competition. If a man who owns a dozen theatres comes in to me and says, "I will take a picture for the whole dozen theatres if you will give it to me at a price," and I give him a better price than I could possibly give him if he was just giving me one theatre, I do not see how it can be regarded as a restraint on competition. But the essential part of this is the give-away of the necessitated use by Mr. Wright of the word "unaffiliated." What a queer kind of conspiracy where it is suggested that we discriminate not in favor of affiliated circuits but we also discriminate in favor of unaffiliated circuits. I put that to you as a juror in the box, your Honors. Would that make any sense in supporting a contention that we were engaged in a conspiracy to monopolize?

"Oh," but says Mr. Wright, "you show a discrimination because I have shown that in a few trifling instances larger percentages were paid for subsequent-runs than for prior-runs."

Now, Judge Bright may remember that he asked some questions about that during the course of the trial, and I brought out clearly what is demonstrated beyond possibility of cavil at page 19 in my brief that the run is only one of the factors that determines price; and I gave as the cardinal example of it the evidence which I adduced from one of the witnesses about th Music Hall here. The Music Hall pays a lower initial percentage than almost any other theatre for its first-runs. Why? Because it has a big stage show, an

enormous seating capacity, and because a producer can afford profitably to give them a lower rate; and that is not the only example of it. For that evidence to have probative effect on the issue of a conspiracy to monopolize, you would have to show, one, that it was widespread, and the evidence here shows only I think three or four instances of it, countrywide, not very many more—I won't guarantee that exact number. You would also have to show that it was a systematic practice directed against non-affiliates, where on my brief I show that in many instances, in several instances at least, non-affiliates had the advantage in that kind of price discrimination, if you please—and I am not afraid to use the word "discrimination," because, as I have said on my brief, discrimination becomes legally important in this case only if it rises to the dignity of proof of conspiracy to restrain. Of course we discriminate, and so does everybody else who sells anything. And I am saying that this discrimination to which I am presently referring is legally insignificant because it lacks that quality, and because the Government gave no proof from which any inference of invidious organized exclusion of unaffiliated theatres could be drawn.

Now, uniformity of conduct: The Government says, "You license the same people every year." You can go through this country, your Honors, and you will see clothing stores—Hart, Schaffner & Marx stores, or Kirschbaum stores, or College—I do not know some of these other trade names—or, let us say Adam Hats, as my friend suggests—you can't deduce from mere uniformity any significance; and I am not going to turn to the brief to get those cases which you heard where the courts say that mere uniformity is no evidence of conspiracy.

Uniformity also of admission price, they say: There is that beautiful quotation in one of the cases. This is also from the second Standard Oil case:

"Grocers, butchers, and all other lines in the same markets generally sell the same things at the same prices for the sound reasons that they wish to get all they can; that they

cannot get more than the price at which the bulk of what is sold in their respective markets is selling, and that they do not think it wise to cut prices."

To all of those considerations we plead guilty. Go out on Broadway here and the adjacent streets and tell me what difference there is in the prices charged for admission by the legitimate theatres?

Now, your Honors, I want to be realistic about this. Isn't it just a little nonsensical to talk about an inference of conspiracy from the fact that a motion picture house is known as a 50-cent house or a 75-cent house, and that it does not change? I am not going to labor that point. I give it to you confident that I am preferring facts over a doctrinaire preference for deductive logic.

Now, clearance and run: I think you have been fed up on clearance and run, but there is one thing I want to say about it: First, we have in this consent decree a provision that clearance reasonable in time and area is essential to the conduct of this business. I do not have to estop the Government by that judicial pronouncement. You read Judge Chesnut's opinion in the Westway case, and you can't escape from it. He reviews that evidence of the kind that you have heard here. And when Mr. Wright talks about abolishing clearance, I find myself the defender of a public interest, not he. I would like to see what would happen to Mr. Wright if he went before a group of independent, second-run exhibitors and told them that he had got a decree abolishing clearance. I told you I like him, and I would be deeply concerned for his physical safety.

Now I put it humorously, your Honor,—quasi-humorously—but it is true you can't run this business without clearance.

Judge Hand: But he has had a spiritual conversion here in the nature of a revival.

Mr. Proskauer: The trouble with Mr. Wright's spiritual conversions is that they are so frequent, so contradictory, and so impalpable that at times I think if I may put it humorously, they are spiritous rather than spiritual.

Mr. Proskauer on behalf of Defendant Warner

I am not going to spend any more time on defending clearance per se, but it does not follow from what I have said that clearance is not capable of abuse as an instrument for the suppression of legitimate competition. It is because of that fact that we put in these provisions in the consent decree.

My good friend Caskey this morning broke my heart by reading one statement of Mr. Hays's that I had here that I wanted to read. Maybe he won't mind and your Honors won't if I just read a word or two of it to emphasize this point I am making.

Here you have this system of clearance which I say without fear of successful contradiction is essential to the business of this industry, and you have 18,000 theatres scrapping about it, and we come in and we say, "We don't want to use clearance as an instrument of oppression." We say, "We consent to the granting of your prayer, Mr. Hayes," —Mr. Wright's distinguished predecessor—"for the appointment of a great arbitral system out of which we can't make anything, we can only lose, and we are so anxious to be sure that clearance and run are being properly handled that we will pay the hundreds of thousands of dollars of expense for the maintenance of that system so that any little fellow anywhere in the United States if he thinks he has got a raw deal can come in and for practically nothing get an immediate decision."

Now what does Mr. Hayes say about that:

"There is no fairer way to handle and dispose of complaints concerning clearance than to have the clearance fixed by some impartial arbitrator."

I say that, the Government said it, and the Government's brief even today in one of those moments of reconversion to which Judge Hand referred, uses these words, "We ascribe as fully now as we did in 1940 to the notion that any clearance must be reasonable as to time and area, but now we regard the essentiality of clearance as such as extremely doubtful."

And in another place he concedes, Mr. Wright concedes that this arbitration system to the extent that it operated well and successfully. These are his words:

"It has no complaint"——

Mr. Wright: No question about that one.

Mr. Proskauer: There is no question about anything I say, Mr. Wright.

> "It has no complaint as to the administration of this arbitration system and the arbitrators and the appeal board have admirably performed their intended task of relieving this Court of complaints."

Now I don't like to criticise any brother lawyer, but I have been reading some of these briefs lately and some of these arguments, and I have had awful feelings, truly, for the profession.

Judge Bright: How about the Court?

Mr. Proskauer: Well, I have an awful feeling with the Court.

Judge Hand: I think you have been infinite in your moderation. About 750 pages as against—well, I don't know how many. We had 1500 in the Aluminum case, you know.

Mr. Proskauer: Your Honor, don't tempt me to talk too long. I am going to give you an example of what I mean. You will find three or four of them at the beginning of my brief. But I saw a statement of unreasonable clearances where it said there was a clearance of 365 days, and I said to myself, "In God's name, how can anybody justify that?" And I went and looked it up and this is what I found: that the clearance of 365 days was an ultimate clearance over a theatre that charged 5 cents admission and that intermediate was a whole series of perfectly normal and reasonable clearances.

Now I am giving you that as a caveat. There are a dozen things like that in the plaintiff's brief, and there have been a dozen things like that in the plaintiff's argument.

To sum up—and I call attention to it in my brief—I don't think it is quite according to Hoyle to suggest a clearance like that as something typical of the industry.

Now, has there been any suggestion that clearance was used as a means of unreasonable discrimination against independents? I know of none. Has there been any evidence that there was a serious abuse of clearance other than in the deductive logic of brother Wright? Out of all these fifteen thousand independent theatres in the United States and in the five years that have elapsed since this consent decree, there have been four hundred complaints. Just four hundred! I am not going to burden you with the number that were decided in our favor and the number that were inconsequential, and the number that were settled. Let us suppose, arguendo, that they were all justified complaints. Seriously, when you have given them, by this consent decree, a method of speedy alleviation of their sorrows, when there are only four hundred people who have complained during the whole five years, out of 18,000 theatres, isn't it a little strain on one's credulity to suggest that there has been an abuse of the system of clearance in order to effect a monopolistic restraint on interstate commerce?

I must be getting along. I have been going an hour. Price fixing. I am not going to gild refined gold by going over Whitney Seymour's argument, but I want to make one addition to it, and it is elicited by a question of Judge Bright's. He asked about this theory of the Government's, that the theatre was not charging just for the exhibition of the picture but for the short, or whatever else went with the picture, and that leads me to try to clarify, as it lies in my mind, what these tie-in cases mean. What they hold is that if I have a patent or a copyright, my legal monopoly does not entitle me to say to a man, "I will license you this picture, but you have got to buy from me some candy or something else." That hasn't anything in the world to do with the essential purpose and effect of the copyright or the patent. You cannot use a patent or a copyright right to impose on a

buyer or a licensee something that you demand from him in connection with a subject matter foreign to your legitimate monopoly. What in the world has that got to do with the situations where I license a theatre owner to show my film? I don't tell him he has got to show it with a news reel? I don't tell him anything. And I impose no condition upon him excepting that for any shows he gives which show my picture, he is to give me 25, 30, 15 per cent of it. There is no tie-in in that such as there is in the cases which have been decided, And that is the sole addition, and I think it is an essential one, I shall make to the brilliant argument of my friend Whitney Seymour. I trust that your Honors will bear that in mind.

Price discrimination. I want to add a word about that, and I am a little out of my logical order. I wrote this in here and I did not get it in in the right place. You will forgive me for going back on my tracks for just a minute.

They say, Warners, you are guilty of price discrimination because you have made a deal with Richards down in New Orleans to show pictures at all of his chain of theatres for 15 per cent. I wish your Honors would read the colloquy that occurred during the trial when that evidence was adduced. Richards is an independent theatre operator. He has an independent chain of theatres but—don't interrupt me, Mr. Wright; everything I say is right—but he happens also to have some connection with a specific Paramount theatre or theatres—I have forgotten—and he buys for all of them. We say to Mr. Richards, "not because you happen to have a small interest with Paramount, but because you, entirely independent of Paramount, are the operator of a big chain of local theatres, we will make an overall deal with you for 15 per cent." Are we giving away ourselves to Paramount? Why, it is absurd. The fact that Richards had this little interest with Paramount in a theatre gives to this case nothing of discrimination by us in favor of Paramount.

Judge Bright: How about a discrimination against independents?

Mr. Proskauer: He is an independent. Most of his theatres are independent.

Judge Bright: Other independents outside of that chain?

Mr. Proskauer: I have got a right to discriminate when I sell my pictures. I have said, sir, and I have maintained that right unquestionably, I have a right to reduce my price to a large customer. That is not discrimination in any legal sense. There is a lot of talk about discrimination here which has no legal significance, and I am glad you put that question to me, Judge Bright, because I would like to answer it head-on. I discriminate every time I make a sale or a license. I take my customer, I make my deal with him. If he is a good customer, and I think I can make a lot of money by reducing the price, I discriminate in his favor. There is no law against discrimination. The kind of discrimination that is outlawed is a discrimination practiced in connection with an attempt to restrain trade unlawfully, unreasonably, or to create a monopoly. And I rest on that proposition, sir.

Now we come to the next ——

Judge Hand: How did this deal leave the New Orleans situation?

Mr. Proskauer: So far as I know, I know of no complaints about it. Was there ever any? No evidence of any complaint or trouble at all. Mr. Wright just digs this situation out of the papers we furnished him. I never heard of any trouble about it. I have never heard anybody complain about it. That is one of those deductive things.

In every case there is a residuum of atmospheric argument and the Government constantly insinuates here, oh, the Goldman case was decided against you, and the Schine case, and the Interstate case. Therefore, you must be bad people. Well, I might retort in kind, the Gary case and the Shad case, and I have another case written down here and I have lost it—the Westaway case—they were all decided in our favor, so we must be good people. But what it comes down to, your Honors, is this, and I am going to have a word to say about sore spots later, because I know Judge Hand's

mind has been running on that a little during this trial, I said, when I opened this case to your Honors, that it would be incredible if, in the conduct of a great industry like this, with all its complications, you could not find something to cavil about.

We have been blackjacked by that circuit down there in the Interstate case, and wrongly, wrongly! We yielded to a species of blackmail and made a perfectly illegal agreement to fix the price of other people's theatres as a condition of licensing to that circuit's theatre. I have no quarrel with that case. It was righted as a local situation by a court of justice.

We got the Goldman case, where the court drew an inference of fact that we had entered into an agreement not to sell to a particular theatre. That decision has righted what the court held, and which I believe incorrectly, to be a wrong. And so with every one of these four or five or six cases that are constantly thrown in our teeth here.

That Chicago case, a jury found—a jury found—as a fact that there had been an agreement not to sell to a theatre.

Judge Hand: What became of the Goldman case, is it through?

Mr. Proskauer: No, sir.

Judge Hand: There is an application for a writ or something, or is there a writ?

Mr. Proskauer: I don't want to take the time to tell you all the things about it at the moment.

Judge Hand: No.

Mr. Proskauer: Suffice to say that there are some interlocutory proceedings going on. They asked for a jury trial on damages. Judge Kirkpatrick refused to give it to them. They brought a mandamus in the Circuit Court against Judge Kirkpatrick and it has been argued. I don't think it has been decided. Has it? It hasn't been decided yet. Meanwhile, we are all marking time until we can get somewhere in the case and go up on appeal.

Mr. Proskauer on behalf of Defendant Warner

On this phase of the case, your Honors, I am just submitting to you, you cannot prove this case by showing that in three or four instances there were specific local situations where the courts redressed a wrong, particularly in view of Mr. Wright's emphasis yesterday that he was not driving at specific things; he was directing his claim against the whole nationwide pattern of this industry.

What is the next thing they say? Cross licensing. Again I am not going to paint the lily by going over what Mr. Seymour said. As far as Warner Bros. are concerned, I say that it is not only the oath of our officers which demonstrates beyond the possibility of contradiction, I mean beyond the possibility of it, that we never conditioned what we licensed for our theatres by what we license to the theatres of our co-defendants. I have elaborated that on my brief. I am not going to detain you here with it on oral argument.

Judge Bright: Is there any contention to the contrary?

Mr. Proskauer: I don't know. I never can tell what Mr. Wright is contending. If your Honor cares to ask it of him, I should be delighted to have his answer.

Mr. Wright: I think you are right, Judge Bright, there is no contention that each contract they make with each other is conditioned upon the execution of a similar agreement.

Mr. Proskauer: You see, the trouble with Mr. Wright's concessions is that they always have a little modification. Now, the answer to that question was yes or no. I do not know what he meant by the addition. I am saying that the evidence demonstrates beyond the possibility of contradiction that there is no back scratching. That is a word perhaps that he can understand.

Mr. Wright: That we do not concede.

Judge Bright: I do not think he concedes that.

Mr. Wright: That is right.

Mr. Proskauer: Then I make my point.

Judge Hand: It shows the great danger of figures of speech.

Mr. Proskauer on behalf of Defendant Warner

Mr. Proskauer: Let me put it literally so that even an Assistant Attorney General can understand it. I say that the evidence shows beyond the possibility of contradiction that there is no such cross-licensing as will support any inference that we condition what we license to and by what we license from the co-defendants, so that there is no inference therefrom of a conspiracy to exclude anybody else.

Mr. Wright: That we deny.

Mr. Proskauer: All right, then I will just give you one example of it out of a half dozen places which I treated in my brief. I say there is no pattern whatever. If you had a pattern you would suppose that when we licensed more from Loew's, they would license more from us, and vice versa, with all of them. I shall just read a few of them. They are all in this brief: In 1931 and 1932 we paid Loew's 40 per cent less than we did the prior year. Loew paid us 43 per cent more. In the next year we paid them 22 per cent more than in the prior year. They paid us 62 per cent less. Now, I am not taking that as an isolated example. I am telling your Honors that this brief will demonstrate that that is typical and there is nothing in this case as to cross-licensing, as Mr. Seymour developed this morning, which gives rise to any inference of conspiracy to restrain trade.

Now, public interest: I have referred to that briefly, and I make only a passing reference to it now. The growth of the theatres, the millions we spend in competitive distribution; the enormous increase in the cost of pictures absorbed entirely by us, as is indisputable, shown by an exhibit we put in evidence, the cost never passed on to the public; admission prices remaining about the same—I do not know what the humorous phase of it is. Mr. Wright seems to be enjoying it, outwardly. I am stating that to be what the evidence in this case shows.

Now, it is developed in this case that there are certain places that we call sore spots, possible sore spots; and there was a great to-do made about Albany. And particularly yesterday Mr. Wright made a great pother about a contract

we made with the Fast Company, I think it was, in which it was provided that that company should operate only in Albany and Troy, as I remember.

Mr. Wright: You did not make it.

Mr. Proskauer: I beg your pardon?

Mr. Wright: I was going to say that appeared in the RKO agreement with Fast. Maybe it appears in yours too; I do not know it, if it did.

Mr. Proskauer: Well, I don't know whether it was with us or with RKO. It does not make any difference with respect to what I am going to say.

And he left your Honors under the impression that that was some kind of a covenant not to compete anywhere else, and, therefore, there was something illegal in it; and when you analyze it, what do you find? Here is this man Fabian, a well known independent theatre operator, unaffiliated with us, operating theatres in a number of cities, and he comes up to Albany—and the detail of this deal is in the brief, and I am not going to go into a mass of it—he comes up to Albany and he wants to make a deal by which if he does not build a new theatre he can get an interest in our theatre. And we say to him, "All right, there is not enough business here for two theatres. We do not want cutthroat competition. We will make a deal with you, and we will give you an interest in this theatre, so you won't build the other theatre right across the street from us." We have a right to do that on the local scene if we are not using oppressive tactics to force Fabian—and I may say you may almost take judicial notice that nobody uses any oppressive tactics to force Fabian. He is one of the biggest and most successful operators in the country.

Now, we say, "We are going to form a separate corporation with you, but we do not want that corporation doing business outside. We want to restrict this business to the particular area in which we are negotiating with you." And that provision is made. And Mr. Wright used that yesterday as though that was some kind of an agreement to pre-

vent competiton in other cities, whereas, in truth and in fact and objectively it left Fabian perfectly free, Fabian the man, independently of this corporation, to go and open theatres anywhere in the world he pleased. Now, that just does not make sense.

Philadelphia—and I am taking my sore spots—we happened to own all the first-run theatres in Philadelphia. You heard the story of how we came to get them. Why, your Honors, if there is anything wrong in those—and I do not concede there is—they are being corrected on the local scene.

One of the Judges asked this morning, "Could you correct them here?" If you thought that they had force you could correct them here. It is certainly within your power.

I urge that it is not within the mandate that this evidence gives you, where it is perfectly clear that it is being treated locally, but, certainly there is nothing in those situations to support the picture of this nationwide conspiracy to which my friend referred; and the same thing goes for pools. That is an awfully ugly word. There are no pools here in the technical sense of pools that have been condemned under some of the authorities. Mr. Seymour told you how they originated. Nobody gave any evidence, as far as I remember, as to the extent to which those pools were with independents or affiliates. And why? Because they are de minimis.

Warner Bros.—and how many pools have we got all over the country? 24 I think it is, or something like that. They are utterly inconsequential. Nobody would be hurt if they were maintained, or if they were enjoined. There is not the slightest proof, however, that the pools are limited to co-defendants to make them evidence of a nationwide conspiracy. There is no evidence of that; and if there is any such contention made—here, I have got it written down here.

We had pools in 25 towns, 19 with independents, four with defendants, and two jointly with affiliates and independents.

Now all that evidence is not in the record. It is not in the record because no contrary evidence was given, but I am

asserting to you the real picture to show why Mr. Wright never made any proof that these so-called pools were being used as an instrument of conspiracy among the co-defendants, and I repeat, your Honor, so far as we are concerned they are absolutely negligible. We don't care a rap about them.

Judge Hand: Do you have anything to do with that California situation?

Mr. Proskauer: Not a thing in the world.

Judge Hand: I thought you had.

Mr. Proskauer: Oh, no.

Now I am coming to the end. What is this talk about dissolving us as a monopoly, dissolving Warner Bros., and divorcing Warner Bros. from the Warner Bros. Theatres Corporation?

I have spent a good deal of time in the last week reading the cases on that. This is what they hold, your Honors: In every single case where dissolution was decreed, except in two or three to which I shall refer, the dissolution was based—and I am going to shorten this; I am telling your Honors that that is what you will find when you read the cases—the organization dissolved was itself the monopoly. That was the Tobacco case, that was the Standard Oil case. In two or three cases of which the Reading case is the outstanding case, the organization which was ultimately ordered dissolved was directly the device by which the nefarious practice was being imposed upon the community, that is, a holding company existed in the Reading case by means of which there was an absolute agreement to control wholesale coal prices, and the Court held on one branch of the case that that violated a provision in the Interstate Commerce Law forbidding coal mines from owning coal companies, and it put the provision on that ground and it referred also to the other phase of it, and I am not going to argue that they put it solely on the ground of the Interstate Commerce Act. They said that the whole thing was a device to create

a monopoly, standing alone, not in combination with anybody else. In other words, it was as though you were to find that Warner Bros. and the Warner Bros. Theatres Company together were a monopoly imposing their will and their unjust conduct on a long suffering public.

Now there is nothing like that here. Absolutely nothing. Warners are not a monopoly. There is no monopoly created by any conspiracy between Warner Brothers Pictures Company and Warner Brothers Theatres Company. There is no such charge really. The charge is that those two companies in conspiracy with all these other companies are doing something, and I assert, your Honors, and I want to make this distinction clear because it is an honest, reasonable distinction, there is not a case in the books that ever ordered a dissolution between a parent and a subsidiary company excepting where the combination between parent and subsidiary was itself the vital part either of the monopoly or of the conspiracy to restrain.

And what are the practical consequences of this claim for divorcement? Mr. Wright was questioned yesterday as to what he wanted to do with this industry. So far as anything he has ever said is concerned I think he wants to put it in a vacuum and wrap it up in cotton padding and there let it die and stagnate. You can't run this business divorced. There has not been a human being who lifted his voice here to give any contrary evidence, and every witness testified to the impossibility of running it divorced. I have used in my brief the phrase that Mr. Wright wants to give us an atomic bomb that will take us back into the nickelodeon days, and that is exactly what it is.

But I am not alone in this. I will quote Mr. Hayes again, and this is what he said before Judge Goddard:

> "Both the defendants and the Government honestly believe that it is infinitely to be preferred"—that is, the consent decree—"to years of litigation

with the possibility at the end of the chaos"—that is his word, not mine—"of the chaos that might result from divorcement."

And no matter what else your Honors may think about this case I submit with full confidence that with every consideration for the public interest you are not going to remit this industry into the chaos that would result from disintegration. You are not going to strike down these companies which for a quarter of a century have been doing business as integrated companies. Maybe my period is wrong, but I think it is about right, isn't it? About 20 or 25 years—with harm to nobody, with not a living witness brought here to testify to a single predatory act or practice, with what has been properly called a paper case. I am pleading in the public interest when I ask your Honors to throw this suggestion of divorcement out of consideration as one that would lead to ruin and chaos.

Argument on Behalf of Defendant Columbia Pictures Corporation

Mr. Frohlich: May it please your Honors, we have reached the point in this case where we can say the case has been divided into two parts. I speak for one of the three non-theatre-owning defendants. Our problems are different from those of the five integrated defendants. I am going to confine myself to the problem that I think is the chief problem confronting these three defendants. I am going to speak on block booking, and I am going to speak on the charge of discrimination and nothing else.

We have tried this case here for two months. The Government has submitted voluminous briefs. I sat here patiently yesterday and listened with the greatest attentiveness to Mr. Wright and Mr. Marcus and I have not heard yet why these three defendants are in this case, what they have done that merits condemnation by this Court and what relief is

asked against them. I was startled when the brief was served on me and I found that the Government's counsel said in plain English, "We don't know what relief we want now. Let's find out what this Court will do with the other five defendants and then perhaps we can ask the Court to grant some relief so far as you are concerned."

It is rather a fantastic situation, but it is symptomatic. It indicates, your Honors, that even Mr. Wright is not convinced that this defendant Columbia, or the other two defendants, Universal and United Artists, have broken any law and that they should be condemned by this Court or any relief at all granted against them.

I have no interest in this consent decree. If these other five defendants want that consent decree continued and they wish to operate under it, that is their privilege. I do not. I am fighting here for the very life and existence of this defendant, because we cannot run our business and sell our pictures in the manner that the Government seeks to impose on the industry in small blocks of five or less.

In order to have this Court hold that block booking is an illegal practice the Government must ask this Court to make a finding that block booking is in restraint of trade. I have tried to make that sentence as short as I can, and that I think is the very heart of block booking.

And what is block booking? To my mind it is very much like what Darwin speaks of when he speaks of Natural Selection. It is an evolution that grew up in this young industry in the past 30 or 35 years out of the business, out of what I would say the harmony that is necessary between the exhibitors and the producers and distributors.

Your Honors will recall the testimony of Mr. Montague, who was himself one of the pioneers of the business, originally an exhibitor, and then a state-righter, and now connected as general sales manager of this corporation Columbia. He knew the problems of this business and has grown up with it. And he knew and testified that in the early days of this industry these companies had great difficulty in market-

ing the pictures which they produced. They tried it with franchise holders and it didn't work. They tried it with state rights, and it didn't work. All sorts of devices were used whereby these people could recoup their investment and make a reasonable profit, and they finally came to block booking. They came to this practice under which a company would license its product for a full season to the exhibitor, and that has worked out to this very day. Not only has it worked out with one company but with every company in the business.

Judge Bright: Mr. Frohlich, does the block booking system give the exhibitor any choice or does he have to take your whole product for the whole season?

Mr. Frohlich: No; the testimony is, Judge Bright, that when this exhibitor makes his contract for 44 pictures he has a certain amount of selectivity, and the average selectivity, as Montague testified, is about 32 out of the 44, so that he may reject 12 pictures during the course of the year. And in addition he comes in from time to time with adjustments and we give it to him, and we have been very glad to do it. We want these people to make money with our product.

Judge Hand: Why would it ruin you not to have this system? I don't understand that.

Mr. Frohlich: Well, I am coming to that, Judge Hand. I am trying to explain why it would completely ruin Columbia. To begin with Columbia owns no theatres.

Judge Hand: Let me ask you—I suppose it is not in the record; maybe I have no right to ask you, but I assume it is common property—how about these other independents? Do they have a block booking system?

Mr. Frohlich: Certainly.

Judge Hand: You mean everybody does except these five?

Mr. Frohlich: Monogram and Republic and P. R. C. block book just like Columbia and Universal. And I am going to show your Honors why that would ruin them.

I say to begin with we own no theatres. We have absolutely no method of recouping from any ready market the monies that we put into the production of motion pictures. The other five defendants are fortunate. They own theatres. When they make a picture for a million dollars they can send it into their theatres and they can at least recoup part of their million dollars and try to sell and recoup further moneys from the other theatres. We can't do that. We haven't the slightest outlet for our pictures.

Now the only way in which we can insure some sort of recoupment and reduce the hazard and the gamble, which is inherent in this business like in no other business in the world, is by making these contracts at the beginning of each season with groups of exhibitors under which we know, rain or shine, at the end of that season we will have at least X dollars in our treasury, and will have recouped a part of our investment.

Now that is the only way we can operate. If we couldn't do that, how do you suppose we could spend two million dollars on a picture? Go out and try to sell it piecemeal? That just isn't possible. We have to look to block booking in order to reduce the hazards and enable us to risk that investment.

Now, just think of what has happened in the last 15 years with the rising costs. Columbia originally spent in 1928, 1929, when we were just a young company in the industry, $1,600,000 in one year for all of its pictures. That was the extent of its investment. Times have changed. The cost of producing pictures has advanced. Public taste has changed. You have got to give them more important pictures; and last year we spent $16,600,000.

Now, where do you suppose we could look for $16,600,000 if we had to go down in this country and sell each picture by itself to every exhibitor? We can't do it. The only reason we can spend $16,600,000 is that we know that we can make contracts in advance for the seasons which will net us maybe ten or twelve or thirteen million dollars, and we

can gamble with the rest. And that is why Columbia must have block booking; and when I say "Columbia," I am speaking for every independent distributor in the United States, the companies that own no theatres, that that have no method of recouping their investment.

As Mr. Montague testified, another consideration, which is a very great and important consideration to Columbia, is that inventories are frozen by this method of selling in small blocks or groups. Here, when we make our contract at the beginning of the season, as we release the picture it is shot out, sent out through the country, and it is released for distribution, and we get our money back, and we get our money back in time to use it and turn it over again during the year. When you take these pictures and split them into small groups and have to wait until they are all manufactured and produced, you have to have trade showings, and then go around and sell them, you just lose that time. You lose four or five months. That was the objection I made originally when this decree came up before Judge Goddard. I said we can't afford to take our money and tie up for four or five months in inventory on the shelf, because we haven't got that kind of money. We certainly can't make 44 pictures a year if we have to do that. That is another one of our problems, and Montague so testified, and that is in the record.

So that again, block booking is essential to these small companies with limited capital; and we are a little company with limited capital, your Honors.

Judge Goddard: What opportunity does the theatre owner have to know what would be in the pictures?

Mr. Frolich: I was just coming to that. Because the Government in condemning block booking—and that condemnation of block booking was not Judge Goddard's idea; it was submitted to him by the Government. The Government insisted it had discovered a way to the promised land. Block booking was going to be destroyed and was going to cure all the evils in the industry; and the Government insisted on it, and that is why I never consented to that decree.

Judge Hand: Of course, there must have been a lot of complaint about it, a big complaint, or they would not have thought they discovered a way to the promised land and done any of these things.

Mr. Frohlich: Well, if there were any complaints about it the time to produce the complaint was right here in this court room, and there was not a witness put on the stand who testified that block booking hurt him. And I know why Mr. Wright did not put an exhibitor on the stand, because he could not get a single exhibitor in the United States—I say that advisedly—who would say that he did not want block booking. You heard Mr. Montague's testimony. Mr. Montague said, "I went to the exhibitors' conventions after 1940 and they were clamoring to go back to block booking."

I would like to have a few of these exhibitors on this stand. I would show you why they do not want this present system. They are not happy with it. This case has been tried in a vacuum; and some of the most important elements which could have been brought out on the stand, and on which the Government had the burden, were not brought out.

The expense of selling pictures in small groups is very substantial. You have got to have a tremendous sales organization; and, again, this little company can't afford it. You have got to sell your pictures eight or nine times a year if you sell them in small groups. That means a sales campaign, publicity, traveling around the country, contacting the exhibitors. Where is the money going to come from? If you think it is not going to hurt Columbia, I will show you how it would hurt Columbia. The Government put in evidence in this case, an exhibit showing the profits that Columbia made in the past ten years.

In ten years, mind you, from 1934 to 1944, and what did it show? It showed that for the first three or four years of that period Columbia, with all its investment, cleared about two million dollars a year, and then there was a falling off and for three years it practically went broke. One year it made nothing; next year it had $500,000, next year $500,000.

And then the war came along and with the lush period of the war, Columbia again made almost two million dollars. It did not make as much during the war as it had made the first three years of that 1934 period.

Now, your Honors, Mr. Montague testified the expense of that selling campaign eight or nine times a year would be a terrific burden on this company. It would certainly entail terrific expenditures and it would eat into these profits. We hadn't any fourteen million dollars profit. This company is living from hand to mouth, after twenty years in business, and to saddle it with that kind of burden and tell it to spend another million or more for additional sales campaigns, is absolutely harsh and unnecessary.

And last but not least, the exhibitors want block booking. I am making that statement advisedly. I have proof of it by Mr. Montague, uncontradicted and unimpeached. There has not been a witness to take that stand to testify to the contrary. And the exhibitors who clamor for block booking today, to give them an assurance of product, are entitled to some consideration too.

Why didn't the Government, with all its resources, knowing that this was a critical point in the case, terrifically critical, why didn't they produce witnesses here and make proof to show that block booking was bad and vicious and a violation of the Sherman Act? Because, don't forget, your Honors, if you are going to take away block booking you will have to make a finding that block booking violates the Sherman Act in restraint of trade, and you will have to reverse two courts, one the Second Circuit Court of Appeals, and one, the Third, which have held that block booking is a very lawful practice. And I will show you how the Government attempts to supply this want of proof by language in the brief. Here is the way the Government brushes aside all considerations of evidence and proof. I am an old-fashioned lawyer and, in my mind, you have got to produce proof in a courtroom and then you can argue from that. You don't make statements in a brief. You don't make statements on the floor of the courtroom. So the Government says on page 111 of its brief:

"Block booking is the tying of a series of copyright monopolies to each other and conditioning the availability of one of a block of dramatic works on the acceptance of others."

The Government has said it! Where is there proof in this record of tying in? What did Columbia ever tie in? When it goes to an exhibitor and says "I want you to buy 44 pictures," and he says "Very well, what is your price?" is that tying in? Is that a condition? If I understand the English language, no.

And that is what the Government bases its claim on, solely and simply, on its own statement, when the very case which supports block booking, the Federal Communications Commission case in the Second Circuit Court of Appeals—said there was no tying in.

So the Government is now asking this Court to reverse these two cases, to forget every consideration of fair dealing in the industry, and to take the five small companies and saddle them with a tremendous expense which may bankrupt them, and turn over the business to the other five large companies. That is Mr. Wright's idea of fairness and of a proper decision under the Sherman Act, destroy the little fellow and give the big fellow a real monopoly. And he would have a beautiful one, because these little companies cannot operate under that system, and if block booking is taken away from them, your Honors, they are gone.

To recapitulate, block booking, I say, is a convenient method of selling. It keeps selling expenses down; it does not freeze capital. It makes a ready market, so that a man may gamble those millions and try to appease that fickle public taste; and the exhibitors want it.

Those considerations, I submit to your Honors, should be very weighty and certainly you should not, on the simple statement of Government's counsel in a brief, condemn a practice which has grown up for twenty-five years in this industry, under which every company made money, every com-

pany operated, every exhibitor made money, and the public got the benefit of the skill and genius of these men in this business.

Why condemn this practice and destroy it on absolutely no proof in the record and on the mere statement of the Government, because the Government thinks it is a solution to some of the practices that hurt the industry?

I assure the Court it is no solution, just as much as divorcement is no solution. From the fertile brain of the Department of Justice, block booking was going to be the solution. Today it is divorcement. God alone knows next year what other panacea they are going to have, to solve the problems of this industry.

I am going to have a few words to say, your Honors, on the question of discrimination, and then I will be through.

Judge Goddard: May I ask, the average independent theatre uses how many films a year?

Mr. Frohlich: Well, the average is about two and three hundred pictures a year.

Judge Goddard: And you sell in blocks of 40 from which they must accept 32?

Mr. Frohlich: They usually accept the 32. Sometimes we have to give them an adjustment and they take a few less. And the evidence is that we give the independents all the breaks on it. We give them a better selectivity than we give the affiliates because he needs it, he is a small fellow.

Judge Goddard: They still have an opportunity to get a large supply from the other source?

Mr. Frohlich: Yes, they have an opportunity to do that, of course.

The Government being very sorely pressed and not knowing what to say about Columbia again used its fertile imagination and came out with this very serious charge, wholly unsupported by proof; it said in its brief at page 21, that Columbia, Universal and United Artists are in a different position from non-distributor defendants, in that they have generally reached a satisfactory accomodation with the pro-

ducer exhibitors, which has enabled them to take more film rental individually from these theatres than that of all the non-defendants put together. That is a startling charge! In other words, they say we very little fellows here are members of this conspiracy because we get more money from the affiliates than the other independent non-defendants like Monogram and Republic and Producers Releases Corporation.

In the first place, there isn't the slightest proof in this record of any conspiracy between these three defendants and the other side. There is no proof in this record that there has ever been any discrimination as against the non-defendants. The proof in this record is that Columbia, just like United Artists and Universal, make good pictures. The Government admitted that. It said again in its brief—that was a lapse, because I imagine they must have forgotten what they said in one part of the brief—when they came to the other part of the brief, towards the end, the man who wrote it forgot what he said, but he made a slip here and I am going to hold him to it, he says, "True, such a business is more hazardous", meaning a business without theatres, "is more hazardous but it does yield profits and results in the making and distribution of films comparable to those controlled by the producer-exhibitors." Well, thank him for that concession! At least we make——

Judge Hand: He thinks it makes men of you, not to have theatres.

Mr. Frohlich: At least we make comparable pictures.

The point I want to make is this, if our pictures are comparable to the pictures of the other five defendants, can this Court draw an inference of conspiracy because we sell our pictures to the theatres owned by the other five defendants? Why shouldn't they buy our pictures? Is that any proof in this record that Republic's, that Monogram's, that Producers Releases Corporation's are comparable pictures? And that they were excluded and that we three were favored? Oh, no. No such proof. How dare the Government make that charge without such proof in the record? It is another illustration

of the Government's helplessness in trying to fasten a case on Columbia without proof or evidence of any kind by mere statements in a brief. And it is not honest and it is not fair to these three defendants, who have been dragged through this trial for months and months, to have them come into court and meet that kind of charge.

Judge Hand: Your charge is very much abbreviated by everybody.

Mr. Frohlich: I have done my share at abbreviating it.

Judge Hand: I never could see much of a case against you, I said so in the beginning, but in considering it further, I may yet be convinced that you are in it.

Mr. Frohlich: I have ten minutes more, and I——

The Court: You cannot cleanse your sins by yelling, you know.

Now, we were charged with discrimination; and in order to build up a case of discrimination the Government arbitrarily selected, as your Honor knows, three groups of cities. It took 92 cities of 100,000 or more; it took 413 cities of 25,000 or more; and it took a group of 73 cities which it claimed were closed monopolistic cities, 73 out of 92. Now, there are three groups of cities, and I am just going to very briefly call your Honors' attention to the ultimate figures we submitted in these charts which were put in evidence. In the 92 cities, the proof is that Columbia sells to independents in one-third of those cities, and that is an excellent showing in these large important cities of 100,000 inhabitants or more, with the large theatres in the finest locations.

And then breaking down the 92 cities into the so-called competitive cities where there are independent and affiliates in those cities, Columbia sells to 32 independents of the 48 cities, or 65 per cent.

Now, I submit that is an extremely impressive showing; that we do sell to the independents wherever possible, beginning with the large cities where we could get the most revenue.

The same holds true in the 73 cities. We sell to one-third of the independents in those cities. And again in the com-

petitive situations of 413 cities, we sell 65 per cent to the independents. Now, certainly, Columbia is not discriminating against independents when it goes out in these cities and sells its product to that tremendous proportion of independent theatres.

The Government charges that the defendants did not sell away from each other. Well, in these 92 cities the evidence is that Columbia has sold away in 12 of the cities—"sell away" meaning it takes its product from the affiliated and turns it over to the independent. Certainly that is inconsistent with a conspiracy. It gave "move-overs" to independents in 9 of those cities, again inconsistent with any tie-up or any combination or any conspiracy.

So that the practice and custom of Columbia has been to sell wherever possible to the independents, and we do sell to so many independents that our revenue is derived chiefly from the independents. The evidence shows that about one-third of our revenue is derived from affiliates and about two-thirds from independents. Now, certainly that is not consistent with an adherence to any conspiracy. And in my brief I referred—and I am not going to burden your Honors with any reading from it—to Judge Davies' findings in the Crescent case where the case was tried for two months, and evidence taken, and Judge Davies held that the course of conduct of Columbia has been to sell wherever possible to the independent theatre. Now, that certainly is not consistent with a national conspiracy of any kind.

Judge Hand: Do you have a foreign business?

Mr. Frohlich: Oh yes. Columbia has a foreign business. All these companies have. And we had a foreign headache in the last few years with this foreign business, because we couldn't get any money over. It has been tied up, blocked in London for many years, and so on. But we have that foreign business.

So now I am not going to say any more to your Honors about discrimination. I think the evidence is clear and convincing that Columbia has certainly been selling to independent theatres, and that in no way has it discriminated

with respect to any practice against independents and in favor of these five larger companies.

Judge Goddard: They are apparently your best customers. Why should you want to eliminate them?

Mr. Frohlich: Well, we had to have some customers. We have got to have some customers. After all, Judge Goddard, we are in the market to sell our pictures.

Judge Goddard: Oh, yes. They are your best customers, according to your figures. They buy 65 per cent, did you say? What did you say?

Mr. Frohlich: I thought your Honor said——

Judge Goddard: I am not talking about the foreign business; I am talking about independents.

Mr. Frohlich: The independents are our best customers.

Judge Goddard: 65 per cent?

Mr. Frohlich: 65 per cent of our money comes from the independents throughout the country.

Judge Goddard: Then it would seem to be not to your interest to eliminate them.

Mr. Frohlich: That is quite right. And following self-interest, following self-interest and good common horsesense, we have continued to sell to these independents, all of which is inconsistent with any conspiracy. That is the point. What our motives may be—naturally, our motives are selfish. We are all in this business to make money out of it, to make a living; but we certainly are not party of any conspiracy.

So that in view of the evidence here, your Honors, the failure of the Government to give any proof with respect to block booking; the failure of the Government to show any discrimination; the failure of the Government to show any adherence to a conspiracy by this defendant—I earnestly urge the Court to dismiss this case against Columbia.

Judge Hand: Well, I presume you would rather go over until to tomorrow?

Mr. Raftery: I would, if you don't mind.

Judge Hand: All right. We will adjourn until 10.30 tomorrow.

(Adjourned to January 17, 1946, at 10.30 a. m.)

Mr. Raftery on behalf of Universal and United Artists

New York, January 17, 1946,
10.30 o'clock a.m.

Trial resumed.

ARGUMENT ON BEHALF OF DEFENDANTS UNIVERSAL AND UNITED ARTISTS

Mr. Raftery: If it please the Court, I am going to speak for two defendants, that is, the Universal group and the United Artists Group.

In view of the fact that Mr. Frohlich finished up Columbia last evening, I will start with Universal, because of the great parity between Universals' method of selling and Columbia's. United Artists, on the other hand, is as unlike either of these companies as it unlike any of the five, so I will save them for the last.

Universal is the oldest in point of time of all the companies that have been brought in here by Mr. Wright. It has had a continuous existence in practically the same corporate form with slight changes since 1911.

As shown by the testimony of Mr. Scully, the company underwent a reorganization in 1937 and new management went in. Starting in 1938 the company began to show some real progress, and I believe the Securities and Exchange Commission reports that Mr. Wright introduced showed it had paid a very substantial excess profits tax in the year 1944. At any rate, it increased the number of theatres that it served from an average of 7,400 to an average better than 11,000 in the seven-year period. It had been in red ink almost continuously from 1928 to 1938 and in 1938 they got rid of the red ink bottle and began writing in black.

Now it owns a studio. It is one of the oldest studios of any size in Los Angeles County. In fact, I believe at some point in some of the examinations before trial Mr. Wright brought out that its studio is known as Universal City, and it has a post office Universal City. It operates in a regular straight schedule. By that I mean it produces pictures with

regularity, using its own funds, delivers them to the distributing defendant with regularity, and has a regularity of release and is able to render to a theatre or theatres a steady service, a steady supply of product. It owns no theatres.

I am not going to repeat anything that Mr. Frohlich said about the absolute necessity of a company of that character with approximately 50 releases, with newsreels, with shorts —the absolute necessity of a company of that character, owning no theatres, of selling its product in advance. It must sell its product in advance and it must have a backlog of contracts at all times in order to keep up with production and the costs of production.

I am going to touch one phase that Judge Bright asked Mr. Frohlich that Mr. Frohlich did not go into, and that was blind selling.

Your Honor asked Mr. Frohlich if the exhibitors ever had an opportunity to look at the pictures before they bought them, or something to that effect. Mr. Kupper was called to the stand as the representative of Twentieth Century-Fox; and some counsel asked Mr. Kupper about trade showings. Now, since Judge Goddard's decree the so-called Big Five have been selling their pictures in blocks of five and trade-showing them before the exhibitor even negotiated for the product.

Mr. Kupper was asked, "Do the exhibitors go to trade shows?" And Mr. Kupper rather sadly said, "I regret to say they don't."

Every device known to get exhibitors to go to trade shows has been tried by the five and by United Artists. In fact, only last week, as an added attraction for a trade show that was held at the Normandy Theatre on 53rd Street, held at 10:50 in the morning—and we all know exhibitors do not get up so early in the morning, but 10:50 we thought would be a reasonable hour— and as an added attraction they put a little card in it which entitled every one of them to a free lunch at 21; and the exhibitors were conspicuous by their absence even with the free lunch.

Now, they do not look at pictures. They do not want to look at pictures. I have known exhibitors that—well, there is one in particular. We had a preview out in San Bernadino of the picture "Since You Went Away," and this fellow Richards whom Scully told us so much about, and we heard a lot about it from others—our general sales manager says, "My God! Richards is here tonight. I don't ever remember Richards seeing a picture before."

Now, when they buy pictures and when they bought them over the 20-odd years that they have talked about here, they were buying a trade name. I remember seeing theatres in New England and New York State. They would have a sign in front "Home of Paramount Pictures" or "Home of Metro-Goldwyn-Mayer Pictures." They bought that trade name. I remember when Universal sold a service, and they would sell a man a complete service, and as part of the service would be "The Home of Universal Pictures."

Now, Mr. Scully told us how they set up these groups of pictures. He goes out to the studio either in May or June of each year and he sits down with the studio executives, and he comes back to New York with a complete list of the proposed releases for the theatrical year, which starts sometime, we will say, August 1st or—I think every sales manager has a different starting date—we will say August 1st and ends the following July. He will set that up with his advertising department; they prepare elaborate brochures; they prepare in their contract that they are going to have this special, giving the name of the book or the play; the name of the people who are to be in it; the name of the director who is to direct it; and they go down the line; and then they have in addition—I forget—I think Scully called them his marquee pictures; and he told us marquee pictures were those where you put a name band, or that sort of thing, and you set that up in your contract. You go to your exhibitor.

Now, I do not subscribe a hundred per cent to Mr. Montague's rule that you can average what the exhibitor buys. That is, he said if he had forty-four pictures, his average

showed that thirty-one were bought. That is, thirty-one were committed. The elimination took care of the rest. You can't subscribe to that a hundred per cent. I am more inclined to go along with Scully. Scully says you go in to the exhibitor; you have this brochure; you have this contract; you show him the goods, wares and merchandise you are going to have for that season, and you say, "Here, I am going to have 44 features, 5 specials; I have got a newsreel; I have got some shorts; let us make a deal." And he said you walk out of there with the best deal you can make. He said very rarely are you able to get an exhibitor who will buy your entire block. He may buy 30 of them; he may buy 20. And I think it was Judge Hand who asked Mr. Scully, in effect, "What he really gets is an option on your pictures?"

Now, that is about the way the thing really works out.

Montague told us about the crying towel, where the exhibitor comes in after the contract is made, after he is committed, after he is supposed to play the pictures, and he starts weeping, "I can't play these; they are bad," and so forth, and you adjust them.

So, in reality, blind selling is just another one of these high sounding phrases that have come into this business. We had some more yesterday, such as back scratching, and there are more slogans in the trade, many of which the Government has introduced and many of which the trade itself has introduced. You have got a very peculiar trade. You have more associations than any other; I think when Judge Goddard had his bearing on the consent decree you will recall how many there were; you had briefs from the Southern California Exhibitors Association, the Allied States, the man from Ohio, the man from Texas. You had them from all over. You have all these associations. And they have all these conventions, and they have all these meetings.

Montague summed up his experience since 1940, when the decree was signed, by telling his experience with these associations. Montague testified he was on the committee of distributors that was forever dealing with these folks, trying

to get better trade practices. Montague testified none of them wanted blocks of five; that they preferred to buy in bulk. They wanted to know that their theatre had so many pictures committed for the coming season.

Judge Bright: Did your prospectus carry a synopsis of the picture, the general trend of the plot or theme?

Mr. Raftery: Since 1927 every contract that I know of, that Universal has used, and these brochures I am telling about, has an over-glowing synopsis of what the picture is to be. In fact, your question, Judge Bright, reminds me that I was reading the record of the Federal Trade Commission hearings the other night. Those hearings were conducted by a man named Meyers, who at that time was Federal Trade Commissioner and who now is the head of one of the exhibitor associations. Well, in those hearings that very question came up and they adopted some glowing resolutions. It seems that one company started out to sell a picture called "White Flannels." That was to be a great love story of a college town. Well, somewhere the script got mixed up with something else and when it was finished, it was a dire tragedy of a Pennsylvania mining town. So out of that came this resolution about synopses and what not.

There is another interesting thing in connection with the question of block booking. It was United Artists. At that time United Artists had a general sales manager named Lichtman, who now is one of the top executives of Mr. Davis's client, and a lot of church folks were there at this hearing and they were protesting about block booking because that is where the protests about block booking came from, not from exhibitors; it was from the civic groups—a minister, I forgot his name, I think it was Mr. Holmes, he was the leader of it. And they had a report that some theatre manager gave as an alibi for playing a Mae West picture that, in order to get the other more cultural pictures, he had to take the Mae West picture. Well, everyone there knew there was no honesty in that statement of the theatre manager because the chances are that he would not talk about the other pictures until he got the Mae West.

Now, during it, Mr. Lichtman, in order to give United Artists a particularly good place with the church people, stood up and he says "United Artists is the only company here that does not block book." And there was an exhibitor from Pittsburgh, a man named Denny Harris, and he was an important exhibitor out there. He followed Mr. Lichtman. He said, "If United Artists is the only company that does not block book, then for God's sake give us block booking."

Now that is in the record in the Federal Trade Commission hearings.

Block booking has been—well, it is, I don't know, it is like the five-cent fare, everybody likes to talk about it and nobody does anything about it, because it is an essential thing one way or another.

Now you say blocks of five or trade showing. The trade showing idea came from England. The trade showing has been in existence over there for many, many years. In fact, they are supposed to sell pictures in blocks of one, one picture at a time after trade showing, and only after trade showing. The results of trade showing in England are very apparent. In England you have practically a complete monopoly of production and exhibition. There is no monopoly in distribution because all the American companies are operating over there. In exhibition, you have laws which require the exhibitor to exhibit so many feet, or, numerically, so many British pictures for every foreign picture he shows—the quota laws. The other thing the Government threw in against the importation of films was this trade showing.

What has been the result of it? You have two circuits, in reality, dominating the whole British Empire—that is, the British Isles. You have three circuits, two of whom are controlled by one man. Mr. Rank, whose name is in the papers here. Let me say, by the way, since we left here on the 21st of November they have formed two new national distributing companies in this country, with this Mr. Rank dominating them. That is in line with what Judge Proskauer was talking about, new competition from abroad.

You have complete monopoly of production and you have trade showing and only selling after.

Trade showing in blocks of five is not going to relieve anything in our opinion. Now as regards Universal——

Judge Hand: Well, somebody got very excited about block booking. What is the matter with it? What is the dispute all about? Is it just a question of whether you should have this unlimited choice and unlimited obligation, a sort of free will business as against predestination? What is it?

Mr. Raftery: Well, I look on block booking as a red herring that everybody throws across the trail trying to mask and hide the real economic differences between exhibition and distribution.

Judge Hand: But they all forbade it except your people in this consent decree. What did they do it for?

Mr. Raftery: They have their theatres. They can show their pictures in their own theatres and if they are unlucky enough to have a bad one they can slough it off. Universal has no theatres. If Universal has to get into this trade showing thing they are going to be helpless. At least now they have a contract with an exhibitor and he will have a place for the picture somewhere. You recall Montague's testimony. He said this is an exhibitors' market. It is still an exhibitors' market and it has been for years. The exhibitor buys as much stuff as he needs and no more. He can go out of business by over-buying. If he does he will pay for it. He will try to buy just what he needs and pay as little as he can for it. The difference was explained by Montague and Scully. What the exhibitors want—I will wager today if Metro or Paramount were to offer the rank and file exhibitor in this country a five-year franchise for all their product for the next five years every one of them would jump at it. The same goes for Twentieth Century or any of the other defendants. Here is where the economic difference is: How many pictures can we eliminate from what we buy? It is a right of elimination. Selective contract.

Mr. Raftery on behalf of Universal and United Artists

Any contract that has gone into evidence of any importance with Universal or Columbia are essentially elimination contracts. The exhibitor will buy 44 with the right to eliminate as high as 30 of them. Or he will buy 40 with the right to eliminate 20. I think I saw one contract where he obligated himself to play only 8 out of 40. That is the way the exhibitor buys. He wants the right of elimination.

Now block booking in blocks of five, I can't see any difference between a block of five and a block of 40. It is just a question of degree. No one ever questioned the legality of block booking except in that Federal Trade Commission case which your Honor sat on—Federal Trade v. Paramount. I subscribe that is good law and either of these companies have a perfect right legally to sell their pictures in advance just the same as anybody else in any line of business.

For instance, Judge Proskauer touched lightly on other name products. Johnston & Murphy shoes, you can't buy Johnston & Murphy shoes except in these Whitehouse & Hardy stores. And Hickey-Freeman clothes, you go, I think to Tripler's for those. In all these name products, they will buy them from year to year, from year to year, and year to year. And they will be the only ones who handle them in that competitive area.

Now I submit in this case on the evidence not a single witness has been called to complain either about block booking, blind selling, or any of these practices that Universal is alleged to have indulged in.

Universal only mentioned once in the closing.

Judge Hand: You say that the only difference between block booking and, well, the five-picture arrangement is—well, in either case you would say that the purchaser, the exhibitor, would want to eliminate something if some of the pictures weren't good, and it is therefore just a question of degree in the assortment?

Mr. Raftery: And he generally by contract protects himself when he makes the deal.

Judge Hand: Does he in these five?

Mr. Raftery: Yes—no, not in the five. He has no elimination in the fives. There may be some exhibitor strong enough to do so, but there are no contracts that I have seen in evidence where there are any eliminations.

Judge Goddard: The right of elimination extends to how many pictures? I understand eight. It is blocks of 40 with the right——

Mr. Raftery: No, you don't sell blocks of 40. You sell as many pictures as the exhibitor will buy, and in that there is generally, in all the contracts that have gone into evidence, a typewritten provision that of the 40 pictures licensed the exhibitor is obligated to play a minimum of 10. Well, if he has that provision he throws out 30, if he wants to.

Judge Goddard: You mean he has a right out of 40 to eliminate 30?

Mr. Raftery: There are contracts like that in evidence.

Judge Hand: Well, that is not really block booking.

Mr. Raftery: Yes. It is just another slogan. It is just a question of degree. As Mr. Scully put it we have a seasonal product and we try to sell it all, and if we don't succeed we sell as much as we can.

Judge Hand: In block booking contracts what is the average number that an exhibitor can eliminate?

Mr. Raftery: That I can't answer, because it depends upon each individual contract.

Judge Bright: It is part of the dicker.

Mr. Raftery: It is part of the dicker. There is no obligation on his part to buy any.

Judge Bright: Where does the public come out on that type of buying? The public has to see mediocre pictures or scrubs.

Mr. Raftery: It can see mediocre pictures on any arrangement. For instance, we sell pictures one at a time. We had a picture called "A Voice in the Wind," which we thought was a good picture. No one else thought so. No one else bothered to see it. We sold that on an individual contract, one picture. The public—I don't know, they seem to know

the pictures they want to see. I have gone in and sat through pictures in theatres that I thought were terrible.

Judge Goddard: Do you mean, Mr. Raftery, the exhibitor may take 40 or he may take only one?

Mr. Raftery: There are contracts to that effect in here.

Judge Goddard: I got the impression that the Government charged here that you compel an exhibitor to take so many pictures.

Mr. Raftery: No. The Government hasn't produced a single witness to show that he was ever required to take more Universal pictures than he wanted to take—not one.

On the contrary, if you look at the Universal franchises that are in, those three-year deals, those are broken down into a one-year deal and a two-year deal superimposed on it if the exhibitor wants it. Seven hundred odd independent exhibitors bought those three-year deals.

Judge Hand: Well, it is very hard to see why there has been all this outcry about block booking if it makes no difference, and particularly if nobody was requiring it. That is certainly inconsistent with ordinary probabilities.

Mr. Raftery: If there was any hue and cry against block booking it would come from the exhibitors. And not one exhibitor has come forward on this trial to complain in one degree against selling pictures in advance. Not one.

Judge Bright: As I understand your argument, you are in favor of block booking because it is an economic necessity, but it is not to the other five?

Mr. Raftery: I would say to the other five block booking would be just as good for them as the way they sell in blocks of five. When I say block booking, I mean to sell it all in advance. Of course, they have the economic advantage of having their own theatres to exhibit their pictures in. You heard Mr. Rathvon say on the stand that he will take a picture and put it in the Palace Theatre and gladly come out of there without any film rental just to put the picture across for the future exhibitions. Well, Universal has not any theatres to do that. Neither has Columbia.

I say this, to your Honors: I say that any restriction on the right of the trader to sell either in ones or blocks of two or blocks of forty, that there is no place in the law where the Government has reached a point where they can regulate industry to that extent. Block booking is just an outgrowth of show business. When the key theatres here in town were the vaudeville houses, you would make a deal with Keith for 40 weeks of vaudeville. You did not know what you were going to get every week, except that you knew you would get a Keith bill, and you knew the trade name you were dealing with.

I do not say that every Universal picture made is a good picture. In fact, I think it was Judge Proskauer on the first or second or third day of the trial proved that worst picture ever played in Philadelphia was the Universal picture, at the Earl Theatre—oh, it did not play the Earl; it played a theatre which normally is a second-run house; it never had a first-run. But I do say as a trader they have the absolute legal right to sell their product in advance either in blocks of ten or forty or twenty; because no one has been hurt; no exhibitor has come forward to say it is not the way he wants to buy. No exhibitor has come here and said, "They blackjacked me or coerced me or forced me into taking his product that I did not need." On the contrary, the record is absolutely silent as far as evidence is concerned.

Judge Hand: Well, then you have a sort of a confession and avoidance argument which is, at least in this case now, that there is no block booking in the old sense?

Mr. Raftery: That is right.

Mr. Scully testified fully on that as to the manner and method of selling Universal pictures. Mr. Montague testified fully as to Columbia, and contracts were put in evidence. Now, we do not think the issue is of any importance. We never have thought it was an important issue. We think the hue and cry has been a bugaboo that was raised originally as an alibi, and it was completely disposed of in the Federal Trade Commission case here in this circuit.

Now, in that Federal Trade Commission case they took thousands of pages of testimony all over the country, the Federal Trade Commission did, and they issued a cease and desist order, and that order was upset in this court; and we submit that is the law as far as block booking and blind selling are concerned.

Judge Hand: Did they seek a review of that in the Supreme Court?

Mr. Raftery: I do not know. I could not say.

Now, in the Crescent case and in the Interstate case, every one of these cases that Mr. Wright relies upon, practically all the contracts involved, with the exception of United Artists in those cases—that means Paramount, Fox, Universal, everyone, were this type of contract. And somewhere along the line in the judicial decision someone would have said contrary to the Federal Trade Commission if there was any thought on the part of the Court that there was any illegality in he practice. In fact, in the Crescent case voluminous Universal contracts were introduced by the Government; and we put in a few they left out; and Judge Davies' findings of fact and conclusions of law—I think it is Government's Exhibit 299 in this case—gives Universal a complete clean bill of health. As far as Columbia, they were dismissed at the close of the Government's case; and every contract that was put in—and there were hundreds of Columbia's contracts—were on this same form or substantially the same form we have got here.

Judge Goddard: Mr. Raftery, do you say that an exhibitor may either contract for a single or for a block of pictures? Is that at his option?

Mr. Raftery: I would not go that far, Judge. Universal might say this. Here you have got two competing exhibitors, one with a theatre across the street from the other; and your salesman goes in to Exhibitor A, and he says, "I will only buy one picture; I will buy that big special you have got." And we will say, "What about the rest of our product? You

are not going to talk about that? And he says, "I am not interested." Well, we will go across the street to the competitor. He goes across the street and makes a deal. He may be able to sell 20 over there. He is not going to sit back and let the exhibitor punish him, because the exhibitor is not the kindest fellow in the world, as Scully's testimony indicated during the trial.

For instance, you take Fall River, Massachusetts. You remember we had a lot of talk about our friend Yamins. He has not bought a Universal picture for about five years. Richards, down in New Orleans, he has not bought a Universal picture in six years. And the result of that is that Scully went out and created competition against him. That is, he went to little theatres and got them to remodel their theatres, fix their theatres up, and gave them three-year franchises.

Now, just one word on those franchises: The Government did not mention them in the final argument, but they referred to them just a little bit in the brief. Every one of these franchises in evidence—and when I handed those to the clerk the other day was not to add to that stack you got; but I remembered a promise I had made to put the exhibits together and have a set for the Court. You have got here, I think, about 700-odd franchises, all Universal franchises, all made during the last three years. The longest is about three years in duration. I think that is right, isn't it, Mr. Wright, three years?

Mr. Wright: You have the exhibit there.

Mr. Raftery: Well, they are either two or three years. Now, we submit that this is not the forum or not the lawsuit to litigate any one of these franchises. We submit that if there is any illegality in any one of these documents, a necessary party to any litigation is the exhibitor. It is like Judge Hand said about Albany, it is a local situation. Now, not one competing exhibitor has come forward to offer any evidence that any one of these franchises in any way prejudiced him directly, indirectly, or in any way at all.

Now, we submit that any judicial consideration of each of these documents must be in a litigation where the exhibitor is a party, Universal is a party, and whoever has been injured; and that each franchise would have to be litigated separately; the Court would have to inquire into the nature, the extent and the area affected by each one; and that is nothing that can be even talked about here.

Now, what is the situation with regard to Universal? Universal, according to the testimony of the five exhibitor defendants, has improved in stature steadily since 1938. The quality of its pictures has improved; what they have paid them in film rental has improved; their grosses have generally improved, according to the Securities and Exchange Commission report put in by Mr. Wright; and they are rendering a better service to the exhibitors today than they ever rendered in their history. Now, that is the sum and substance of Universal. They are hardly mentioned in the brief, except on this block booking, which is the red herring that somebody somewhere along the line has been throwing across since 1922 and which generally ends up as a lot of nothing.

Now, United Artists is an entirely different type of company than Universal. It is entirely different from any of the five. United Artists is perhaps the least dependable of all the distributors. We own no studio; we produce no pictures; and many times we live entirely on promises from our producers that do not materialize. We have gone as much as five months without a picture. In fact, one year we had to go out and buy some Paramount pictures, because they had too much inventory and could not handle them, and we had nothing—oh, I withdraw that nothing—we had one picture, a picture called "Moon and Six Pence" which was in production but not delivered. So we went out and bought some Paramount pictures, including some Hopalong Cassidys. We had never been in the Western business before, but we got in, and we found out it was a pretty good business. We bought about eight other features. Well, we had enough to

have a convention, and we had just hired a short time before a man who had been the general sales manager for Warner's. So some wit at the convention got up and described our product that year that we had a Warner sales manager selling Paramount pictures for United Artists. And that has been the lack of continuity of delivery which has been our problem since 1919. So, naturally, we have to have a different method of selling than anybody else.

First, under our contracts, which are in evidence, we are required to sell our pictures separately one at a time, and that is the way we sell them. We used to sell them before screening and before they were delivered; and we found that a very bad method for us, because all we were doing was creating a lot of bad will.

I remember one picture we sold three times. I think the name is Life of Rudolph Valentino. To this day that producer has not delivered that picture. We were authorized to sell it and he didn't make it. So, for the most part, over the years, we have sold our pictures one at a time, sometimes after they are finished, sometimes before they are made, and sometimes while they are in production and being made and after we know what we have got.

The Government has referred to United Artists twice in their argument here in closing but they have referred to us about thirty times in the brief. One of the references they have in the brief is an alleged discrimination in Los Angeles County, California. They claim we sold a picture to Skouras or National Theatres on a sliding scale—a picture called Stage Door Canteen—on a sliding scale that started at 20 and went to 50 per cent. We had a great deal of evidence about that. And he says at the same time we sold the same picture to an exhibitor in Burbank for 50 per cent of the gross. That is true, we did. Lazarus testified that in the early stages of selling Stage Door Canteen we tried to get 50 per cent from everybody. In my brief I stated, with a little bit of tongue in cheek, as I did not have the copy of the exhibit, that it was my recollection that we had a con-

tract printed especially for Stage Door Canteen, and in it, so that our salesmen would not be misled; we had printed in there "50 per cent of the gross receipts." I said in all probability that was an early stage of Stage Door Canteen to the man in Burbank, and he went for the 50 per cent. Yesterday my friend here got me out part of what we referred to on the trial as the $800 worth of photostats, and that is the Stage Door Canteen contract for Burbank. It is Exhibit No. 369-1, subdivision 751. And that is a contract for Stage Door Canteen for Burbank, California, and I see printed right across the face of it, "50 per cent of the gross receipts." I said it was an early sale, "15th of July, 1943."

But yesterday I was wondering what was attached to it. We have heard a lot about the preferences given to affiliated circuits. Now, somehow, there got annexed to this exhibit, and I presume it is in evidence because it is out of the bundle, four other contracts, and I see that Woman of the Town was sold to the same exhibitor and he had the right to play Woman of the Town in the Major and/or the Loma, and/or the Magnolia. In other words, he could play it in any one of the three theatres. You remember that is one of the big preferences we gave the big five, let them move it from one theatre to another, or select any one of the three. The terms, he plays it for seven days. He pays 35 per cent of the gross receipts for the first four days, and the last three were reduced to 30 per cent of the gross receipts. "The exhibitor on percentage has the privilege of deducting the cost of the second feature not to exceed $75, from the gross receipts, before computing the film rental." That is another great preference that we gave these affiliates, the right to deduct the second feature. I think there is something in the brief about it, that is, the Government's brief.

Here is another contract attached to this exhibit for Victory Through Air Power. The only difference is, instead of starting at 40 and going down to 35 and going to 30, in this one he starts at 30 and goes to 25. On Hi Diddle Diddle—

Mr. Proskauer: Is that an independent exhibitor?

Mr. Raftery: Yes, this is the big discrimination that is in the brief.

Mr. Proskauer: You did not tell the Court they were independent theatres.

Mr. Raftery: Thanks for doing it. 35 per cent of the gross and 30 on Hi Diddle Diddle. And here is a James Cagney picture, an important picture, 40 per cent of the gross for the first four, 35 for the next four, and the privilege of deducting the cost of the second feature.

I also told your Honors, as the selling got a little tougher, they were forced to strike out that 50 and write in the best deal they could get. Here is the 50 inked out on a contract for the Lamb Amusement Company, and it is dated 12 November, 1943. As the selling got later and the exhibitor got tougher, you had to go down. So, instead of 50 now you get 40, and the split figure. And all through this here—Yamins in Fall River, Newport, Rhode Island, Lafayette theatre in Central Falls, Rhode Island, all independents, the 50 is stricken out, 40 is in. University, Cambridge. Here is one here, Wyandotte, Michigan, where the 50 is out and they are down to 30.

So instead of there being any discrimination of any kind, all that this exhibit shows is that all exhibitors, both the affiliated and the independent, try to get every edge they can from the distributor, irrespective of whether it is United Artists or Universal or Paramount.

Mr. Wright criticizes United Artists on two franchises in his brief, that is all, because we have no other franchises. And the reason, frankly, why we don't make them, we do not think they are good for us. Not that we do not think that they are good for the exhibitor. And in this statement here he says in the case of United Artists, there are closer ties with Loew and Paramount theatres due to two ten-year franchises, with the pattern of distribution set by these franchises continuing since their lapse.

First of all, if you remember, when he offered the Paramount franchise, I stipulated he could put it in on condition he would recognize the fact that in this court, in the Paramount bankruptcy, the franchise terminated in 1933. It wasn't taken over by the Irving Trust Company as Receivers of Publix.

In that franchise, instead of being a ten-year deal that set a pattern for future distribution, it was a five-year deal by operation of law. It was out the window.

I am only going to make one statement in regard to that, that it set a pattern. In 1939-1940 Mr. Wright examined personally our sales force. He examined fully on this Paramount situation. Instead of reading into the record the evidence he got regarding our dealings with Paramount since 1933, he makes this statement with no support of the manner that we have dealt with Paramount since. As a matter of fact, the testimony shows that in New England—we will just take that one sector,—since 1933 United Artists sells against the Paramount theatres in every situation where Paramount has any opposition in the whole of New England except one, and that is New Bedford, Massachusetts, and in New Bedford we did sell against Paramount when we had a fight with the local fellow and we went back selling M. & P.

In this batch of contracts, Paramount has two big fine contracts. In Holyoke, Massachusetts, I just ran across Rifkin, who has a little more or less inferior theatre there. We sold Stage Door Canteen to Rifkin twice. We sold it the first time for a run and then he bought a repeat run, played it twice in the same theatre.

As regards the Loew's franchise, he says we have set the pattern on the Loew franchise. I did not know the Loew franchise was in evidence until I found, instead of going in through us, it went in through the Loew exhibits. The Loew franchise was made in 1927 although dated 1928. When that franchise was made, all the Loew theatres played vaudeville—that we were selling—or stage shows, and the film rental recited in that franchise for practically all our the-

atres was 17½ per cent of the gross. That does not mean for all our pictures but all the pictures covered by that franchise. Some of our producers were not in on it. The 17½ per cent was predicated on the advance in admission prices charged by those theatres plus the vaudeville show. Instead of allowing them to deduct the cost of the vaudeville show, we took 17½ per cent of the show. Sound came in, vaudeville went out, and we considered that a very bad contract from our standpoint and in 1936 we did not renew it, and the contracts that he has put in now, that we are making with Loew, are paying 35 per cent of the gross and higher percentages. There is no pattern since 1936. It is entirely different. And this statement is absolutely without foundation in fact or on any evidence in the record. The evidence is directly to the contrary.

Judge Goddard: What page is that?

Mr. Raftery: That is page 22 of his brief.

Of course the statement that Mr. Frohlich read yesterday just before that, where he says that we have reached a satisfactory accommodation with the producer-exhibitors. We do not subscribe to that. We never reached a satisfactory accommodation with any exhibitor. They won't satisfy us. They cannot satisfy us.

He then goes on and says that Universal's distribution pattern exhibits a similar tie with RKO.

Judge Hand: Where are you reading from?

Mr. Raftery: Page 22, the top of the page.

This is, in fact, the most insidious charge against United Artists and Universal. It is the bottom of page 21, and 22 right at the top.

Judge Hand: Yes.

Mr. Raftery: In other words, he says that we are able to get the crumbs from the table of Paramount and Loew, and Universal gets them from Paramount. I think Scully testified here that he sold half of his Universal product to Loew in New York. He got mad at RKO in Chicago, took his

product away, and he is selling it to B. & K. out there, which is a Paramount affiliate. He took the product away from RKO in San Francisco and he is selling it to Blumenfeld. And only recently, he testified, that down there in Los Angeles he said he made other accommodations because he could not get what he wanted out of RKO. In other words, it is a gratuitous statement. There is no pattern. The evidence is entirely different.

I have talked enough about this, because I think in our brief we have covered everything.

As I understand the Government's argument they have extended what they have asked for in their brief. In their brief they ask for divorcement and then they ask for no relief against United or Universal or Columbia as distributors. But on the argument yesterday or the day before Mr. Wright and Mr. Marcus stated—and I am going to try to paraphrase their contentions, and I am going to try to close very quickly after that—they want divorcement first. They have not signified the nature of the divorce, how it is going to operate, whether it is just going to be the creation of a lot of local circuits, and I don't know whether our state will be worse then than it is now. At any rate I don't know what they want on that and I am not going to talk about it.

But they want to force the selling of pictures on the auction block, if I correctly understood Mr. Wright. They want the elimination of clearance completely. They say that the distributor shall go out and select his run and sell his run. I think it was Judge Bright, or it may have been Judge Hand, who asked Mr. Wright what would happen if you were just having the distributor selling the runs, no clearances, and the exhibitor using the same 300 or 350 prints.

One of Mr. Wright's predecessors—I don't know which one it was—he set up some kind of a complaint department down in the Department of Justice, and every time an exhibitor had a squawk he would write a letter to the Department of Justice. Then the Department in turn would write

a letter to all the distributors. Then everybody would write letters back and forth.

Now what would happen would be simply this: we would select the 81st Street Theatre, if there is one at 81st Street, and we would give it the run there. The man at 83rd Street would say, "I can't get it; 81st Street is getting it." He would write a letter to the Department of Justice. In other words, we would be back in that letter-writing stage we were in for several years before this lawsuit was filed.

Judge Hand has talked considerably about the Westerway case. I was one of the associate counsel in that case, and I recall the plaintiff telling how he operated in that case. He would go to Washington to the exchanges to try to buy pictures ahead of Durkee, the independent exhibitor he was talking about.

"What did you do?"

"I would go down to Warner Brothers."

"Whom would you see?"

"The branch manager."

"What would you do then?"

"I would go up to the Department of Justice."

"Whom did you see there?"

"Mr. So and So."

"What did he say?"

"Go back to RKO. See if you can get some pictures from RKO."

The whole sum and substance of the testimony before Judge Chesnut was that he in partnership with the representative of the Department of Justice was trying to break down Durkee's clearance and get clearance for himself.

If you are going to go back—not go back, create a new method of creating runs with no clearance, then I can see nothing but organized chaos as far as distributing pictures is concerned. It is just an economic impossibility.

Now as regards the auction block method, one of the big complaints that we have had from the Department of Justice is that, "You have taken the pictures away from your

old customer and given them to somebody else, either an independent or an affiliate."

Mr. Wright: If the Court please, I think the complaint here states the complaint of the Department of Justice. It seems to me it is going a little bit far outside this question.

Mr. Raftery: I still repeat that in this case there has been the inference created that pictures were taken away from one exhibitor and given to another. That is a false statement because nothing has been taken away from anybody. What is meant: You have a contract for this year and you service your pictures to this theatre here (indicating). For some reason or no reason you decide not to sell this exhibitor the following year. We say there is no obligation to continue with that exhibitor at any time. So we go over here (indicating) and sell over here to the competing account. That is still called a sell-away or a take-away. Now that has been a complaint. Yet, if you are going to auction-block, that will cease to be a complaint, because no one will have any security in the operation of any theatre. Take a theatre like the evidence shows here in the 92 cities, a theatre in Erie, Pennsylvania, caller the Shea's. That plays all the Fox, Metro and United Artists pictures. I think it is a percentage of Fox or Metro, but it is all United Artists and the other two. We know that that theatre is in no way comparable to the big theatre that Warner Bros. have up there. If you are going to auction-block, Warner's can outbid on the individual picture.

You have got to get a customer. You have got to establish the customer. You have got to establish a steady release of your pictures. You have got to establish your revenue. All you are going to get this way is an auction block. Are you going to support your account or are you going to desert your account?

We stated in the beginning that we sell the market as we find it. We didn't create it. And I respectfully submit as far as Universal and United Artists are concerned that we should not be in this court. We have no position in this

court. We have done nothing but sell pictures. If that is a crime we are guilty.

REPLY ARGUMENT ON BEHALF OF THE GOVERNMENT

Mr. Wright: If the Court please, I had not wanted to go back into the events that led up to bringing us where we are today, but in view of the argument that was made yesterday, I think that it is necessary to do it in order to understand the scope of the issues and precisely what this Court is now being called upon to do or not do. I therefore would like to sketch briefly some of the events leading up to the entry of the consent decree, which were omitted from the statement made yesterday.

Now that decree at the time it was presented to Judge Goddard was uniformly opposed by everybody who appeared in court at those hearings except the government and the defendants. All of the other persons who were permitted to be heard, were opposed to it. Those were primarily the circumstances which made it necessary for us to present it, if it were to be made effective at all upon a wholly tentative experimental basis.

We had negotiated with these people for months. We felt that what they had to offer deserved a fair trial, that it should be put into effect on that basis as far as we were concerned. The problem we recognized as a complex one. The Justice Department had been struggling with it for twenty years. We had this mass of complaints which seemed to take up an inordinate amount of our time as well as the courts'. We wanted to get rid of it and solve it if we could, without resort to prolonged litigation.

We hoped that that decree would do the job. But there is not any question but what in the remarks of Mr. Hays and in the decree itself, it was expressly put forward and accepted not as any final solution or adjudication of anything but merely as a decree which would give an opportunity to the parties to find out whether or not there could

be a satisfactory solution of these problems without prolonged litigation.

Now, as to the hearing, Judge Goddard, of course, had no facts before him. The arguments that were made were not addressed to legal propositions. It was simply an airing of complaints; so that the recital in the decree to the effect, of course, that it was not a finding or an adjudication as to anything was simply a necessary consequence of the manner of its presentation; and the responsibility for it was ours. It was our representation to Judge Goddard that the decree should be entered, which he accepted and one which, I suppose, that any judge would accept under similar circumstances. We were willing to take the responsibility for giving the Court the necessary assurance that this relatively radical experiment should be undertaken. And I for one would think the Court was thoroughly justified in undertaking it. I do not want to be understood as asserting here that the Court acted in any way outside its authority in entering that decree. My only point was that if it did what these defendants say it did, and gave them permanent immunity as to any of these matters, then we did not have the right to do it and neither did the Court. But that is not what we did.

Now, as to those limitations on that three-year period, they were not quite accurately stated by Mr. Caskey. As far as the provisions as to method of sale, there was in effect only a one-year trial period as to those. Those were felt at the time to be very drastic things, and some of the industry made the same statements that you hear today, that they were going to be economically ruined by those methods of sale; and very elaborate escape provisions were put into the decree. But the only season during which those five defendants were bound to employ those methods of sale was the season 1941-42. And after that they were free to do anything they chose in those respects.

Now, as to the three-year limitations: They were for a period of three years enjoined from engaging in a general program of expanding their theatre holdings. That limita-

Mr. Wright: You can license, as I see it, under the law five or fifty at a time.

Judge Hand: Yes.

Mr. Wright: In one agreement.

Judge Hand: I used five simply as symbolic.

Mr. Wright: Providing you do not condition the license terms for any one of the five, or fifty, upon the terms which are to be paid for another of the group.

Judge Goddard: What do you mean by "conditioning"? You mean make a price on a certain percentage of the box office receipts of 25 pictures, say?

Mr. Wright: There is no reason why you should not stipulate such percentages for the pictures as you think that they are worth, but what I mean is, you cannot say, "You can have copyright A for 25 per cent of the receipts, if you buy 50, but if you want copyright A alone, it is going to cost you 50 per cent of the receipts." To me, that is plainly conditioning the terms of that copyright on the terms on which the exhibitor buys the other.

Mr. Proskauer: You may sell cheese that way, but you don't have a copyright on the cheese.

Mr. Wright: You may sell cheese that way, but we are not concerned here with how you can sell cheese.

Judge Goddard: As I understand you, Mr. Wright, you say there is no objection to a distributor saying to an exhibitor, "We make a deal on 25 pictures"?

Mr. Wright: Yes, make 25 ——

Judge Goddard: Is that right?

Mr. Wright: Yes, 25 — sell 50, if he has them ready to sell. Of course, blind buying is another aspect of the——

Judge Goddard: Yes, we won't take up blind selling now.

Mr. Wright: Yes.

Judge Goddard: But there is no objection on the part of the Government to a distributor making a contract with a theatre owner to take 25 pictures, or take 40 pictures, with the right to eliminate 8 or 10, if he wishes to?

Mr. Wright: That is right.

Judge Goddard: Your answer is, there is no objection?

Mr. Wright: Yes.

Judge Goddard: I cannot understand what the argument is about.

Mr. Wright: I am sorry that I cannot——

Judge Hand: I understand what he says, but I do not get the classification. I do not understand what it is all about. Why?

Mr. Wright: Well, I think it is a very clear consequence of the position the Supreme Court has taken in interpreting the patent laws.

Judge Hand: They have never taken it about this sort of thing, have they, at all?

Mr. Wright: Well, it seems to me——

Judge Hand: Now, wait a minute. Answer my question. It won't necessarily be a concession that will involve your position. It may or may not. But just answer my question, whether there is any decision directly in point in regard to coypright or patents?

Mr. Wright: Yes.

Judge Hand: Of course, you can talk about the Dry Ice case, and all those things, and the Motion Picture Patents case, and the Socony-Vacuum case and say they are in point. I don't know whether they are or not. I would like to have something like this rather than these analogies. I don't think these are the ordinary tie-in contracts. Maybe they are within the same principle.

Mr. Wright: That is what we contend. I concede we can't come any closer on the facts than, let us say, the Mercoid[1] case and the Motion Picture Patents case. We can't bring you closer to the factual situation that is presented than in those cases. We do rely for our argument on the principles that are to be deduced from what the Supreme

[1]See also United Shoe Machinery Corp. v. U.S., 258 U.S. 451; Hartford Empire Co. v. U.S., 323 U.S. 886; Motion Picture Patents Co. v. Universal Film Co., 235 Fed. 398 (CCA2), aff'd on other grounds 243 U.S. 502; Oxford Varnish Co. v. Ault & W. Corp., 83 F (2d) 764 (CCA6).

Court has done in that whole line of cases reviewed in the Mercoid case the trend of—which has not terminated but which is still going on.

Judge Bright: I wonder if I get you. I understand you to say that any one of these distributors can sell one or more or can license one or more of their copyrights to any distributor providing they do not condition the license of one for the benefit of any of the others.

Mr. Wright: I am not quite clear what you mean by "benefit."

Judge Bright: Well, condition the price or the right to take, the right to buy, for the benefit of any of the others.

Mr. Wright: You mean by benefit, as a means of persuading him to purchase any of the others?

Judge Bright: Well, that is for the benefit——

Mr. Wright: I would say yes. Yes.

Judge Hand: Perhaps I don't get your classification really yet. I should think your answer ought to be no.

Mr. Proskauer: Your Honors, I don't want to transgress the proprieties by too much interruption, and if your Honors think I do, please shut me up, but I would like to pose one question just to clarify this if you will let me.

Judge Hand: All right.

Mr. Proskauer: It comes from one of my associates, and it is so poignant. Sandburg's Lincoln—there are four volumes of them. Each one is separately copyrighted. If you buy them all together you pay $12 for them. If you buy them separately you pay $16. Now is that illegal? Is it illegal to say, "I have got some books and I want to break the set. I will sell them all conditioned on the other, each one separately copyrighted, for a certain price. If you want to break up the set and buy them separately you have got to pay more."

Judge Bright: That is hardly parallel. Your copyrights run to different pictures. They are not really in one book. They are separate stories, every one of them.

Mr. Proskauer: It is parallel, I would say, your Honor, because he says we have a detriment from the copyright law.

His argument is that having a copyright I can't do with my property what I would be entitled to do if I didn't have a copyright.

Mr. Wright: That is right.

Mr. Proskauer: That is what his argument comes down to.

Mr. Wright: No question about that.

Judge Bright: That is the way I understand it. I understand him to say that you can license your copyright on any feature, but you can't sell it upon condition that he buy some other feature or that he pay a price for some other feature or that he do something for the benefit of the other feature.

Mr. Wright: Mr. Marcus calls my attention to the fact that in the Hartford-Empire case differences in royalty payments on the uses of the patents there involved were used to tie the patents together in that case. That was one of the practices employed there, and the technique used was to make the single use at a higher royalty than if used as part of the combination.

If I may go back a moment to the consent decree, it did some other things that were not mentioned here, that I think should also be understood.

There are, as you know, in effect between the Government and the defendants two other consent decrees, one in Chicago, the other in Los Angeles, both of which I think were entered in 1932 and both of which restrained the defendants from engaging in trade practices of various sorts.

Some of the provisions of both of those decrees were suspended and are suspended pending the continuance of the arbitration procedure in this case.[2]

I mention that because it shows the scope of this proceeding which affects not only the decree immediately before you put these other decrees as well.

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[2]There was also a 1930 consent decree in the same litigation as that in which the Los Angeles decree was entered, which was similarly suspended in part. See trial brief App. C, pages 147-149 for details of these proceedings.

At the time the consent decree was entered here, there were two contempt proceedings pending, one in Chicago and one in Los Angeles, under those decrees. The one in Los Angeles had not been set for hearing and was dismissed. The one in Chicago was pending on exceptions to a master's report which had recommended that Paramount and Balaban & Katz should be found guilty of violating the decree and recommended dismissal as to the other distributor defendants. That was disposed of by dismissal of the latter defendants and the entering of nolo pleas by the former defendants, with a payment of $10,000 by them.

At the same time these defendants who are defendants here were also defendants in the three so-called independent circuit suits which were brought in various parts of the country primarily against these combinations of independent exhibitors, but also with these defendants here as co-defendants, and which originally charged not only that the defendant distributors had conspired and combined with the exhibitor groups to impose the restrictions there involved on their competitors, but also charged a conspiracy among the distributors themselves to impose the same restrictions.

Now as a part of the settlement of this suit, we agreed to dismiss from those suits as defendants the consenting defendants to this decree and we also amended those to eliminate the charge of co-conspiracy among the distributors to impose the restraints in question. And that was done so that those suits were left in the position where they would try out a question which we had debated at some length with these defendants as to whether or not any conspiracy among distributors was necessary to constitute a violation of the Act. As the suits were left, they charged no conspiracy between distributors. They charged a conspiracy only between the exhibitor defendants and each of these distributors who were still charged as co-conspirators with the exhibitors but were dismissed as defendants.

Now I would like to outline what from our standpoint we hoped to accomplish during this three-year trial period.

In the first place, one thing we hoped to do which we did do was to get one of these circuit cases litigated through the Supreme Court to get the answer to some of these undecided legal questions. We did that in the Crescent case and we think that if you want to see what the Supreme Court thinks the Interstate Circuit doctrine was, you will find it stated in the Crescent case by the Supreme Court itself[3] rather than in the Westway case or any District Court decision on this question of whether or not you have to have two distributors conspiring together in order to have an unlawful conspiracy under the Sherman Act.

In the Crescent case the Supreme Court held that they did not even have to find for the purpose of establishing liability that Crescent conspired with one distributor; that it was enough that these exhibitor groups combined among themselves to restrain the trade in pictures distributed by these defendants, although the District Court had found expressly that each of the consenting defendants here had separately combined with the exhibitor defendants there for the purpose of restraining the trade of their competitors.

Judge Bright: The Crescent case, is that the Texas case?

Mr. Wright: No, that was the Interstate Circuit case. The Interstate Circuit case directly led to the filing of the Crescent case and these other independent circuit suits which were filed shortly after the decision in the Interstate case came down from the Supreme Court in 1939. At the time of the entry of the consent decree none of those independent circuit cases had been reached for trial.

Now we hoped by the small block limitation as against these defendants not only to make a freer selection of pictures which would make it possible to more sharply differentiate the reward of the good from the bad, and thus stimulate, as we saw it, production and distribution of better pictures, but we hoped with the licensing in small blocks

[3] 323 U.S. 173, 181, Ftn. p. 183. See also references to Interstate Circuit case in Ethyl Gasoline case, 309 U.S. 436, 456-457, and Masonite case, 316 U.S. 265, 275.

tion ceased at the end of the three-year period as did the limitation on the Government against its litigating the——

Judge Hand: I do not understand this.

Mr. Wright: I beg your pardon.

Judge Hand: I do not understand this thing about 1941-42 that you just mentioned. Where is that?

Mr. Wright: The escape provisions I believe are in Section 23, is it, of the decree? Have you Appendix C of our trial brief? That has the decree printed in full.

Judge Hand: We have got the consent decree here.

Mr. Wright: Well, if you will look at Section 12 you will see the escape provisions which made those sections of the decree which dealt with selling dependent for any extension beyond the 1941-42 season upon the securing of like relief against the non-consenting defendants over here. So that actually there was only a firm commitment as to the one season.

Now, with reference to that provision, or the lapse of those provisions, I would like to say too that it is not true that we did nothing——

Judge Hand: Just a minute. That is a very limited matter, isn't it?

Mr. Wright: I just want to clear the thing up as to what happened.

Judge Hand: I do not know just what you mean, but all right.

Judge Goddard: Section 21 provides for three years.

Mr. Wright: Yes, but the three-year period applied generally to the other provisions of the decree. I simply wanted to point out first that there was this one-year trial period for the method of selling provisions, with a proviso that if we got similar relief against the other defendants, that could be extended. The statement was made we did nothing to get such similar relief; and I want to call Judge Goddard's attention to the fact that we did this: We came in before your Honor and attempted to secure a severance of issues as to those three defendants so that we could present

for decision the question of block booking and blind selling independently of the other issues raised in th suit, because we did not see how we could possibly try those other issues separately as to those three defendants. Your Honor will recall that the little three objected to any such severance; and, of course, I think your Honor quite properly ruled that in the absence of consent those issues could not be severed; and there was, therefore, no trial against the little three separately to determine that.

Judge Goddard: The situation is quite simple. That section generally provided for three years, in general terms, and then in Section 12 said in effect that the consenting defendants conformed to the rule of five pictures in a block, but if you did not get the other defendants to agree to it they were only bound to that for a year; isn't that it in substance?

Mr. Wright: That is correct. And we did not get it. I merely wanted to point out that an effort was made to separately adjudicate that block booking, blind selling issue at that time or within the time, which was unsuccessful.

Judge Hand: So far as this decree is concerned they can go on with block booking now?

Mr. Wright: There is nothing to prevent them from using any method of selling they desire, and has not been since the 1941-42 season.

Judge Goddard: They have been at liberty for upwards of two years—it is more than two years—to sell in block booking, but they have not done it; isn't that right?

Mr. Wright: That is quite correct.

Mr. Proskauer: We have said here that we do not want to take any advantage from the escape clause.

Mr. Wright: The evidence I think is clear that the block booking—the difference has been one of degree. It has been confined to small blocks. That is, they have chosen to sell their pictures in groups of five, or an occasional group, I believe, of eight or ten rather than in season groups which were previously used by them and which are still used by Columbia and United Artists.

Mr. Raftery: You mean Universal.

Mr. Wright: Columbia and Universal, quite right.

Judge Hand: You object to those blocks of five arrangement?

Mr. Wright: Yes, we do.

Judge Hand: You just want them to sell picture by picture?

Mr. Wright: We do not think you have to make a separate contract for every picture, but we do feel that the law has quite definitely now reached the stage where it is illegal to condition the sale of one copyright upon another, and that is essentially what happens in this business when the method of sale is such as to tie these groups of copyrights together in the one highly restrictive licensing agreement. That we think clearly under present decisions is absolutely contrary to the purposes of the Copyright Law as well as the Sherman Act, because on its face it tends to prevent the Copyright Law from serving its purpose of differentiating the rewards of the various copyrights in accordance with such merit as they may have.

Now, I concede that as far as exhibitors are concerned, many of them, or perhaps most of them, want the security that comes from having as many pictures as they can tied up with a maximum privilege of elimination. That is the ideal position as far as the exhibitor is concerned. On the other hand, they do want freedom of selection. Now, there is nothing particularly new about this doctrine or its application. As counsel for Columbia pointed out in its brief, there is in effect a consent decree today with respect to Ascap, the organization which deals in music copyrights, which provides that if the user wishes to buy any music copyright singly, he may do so. On the other hand, if he wishes to make a group purchase, he may do that. But the license of one may not be conditioned upon the license of another by the copyright owner.

Now, I am not going to take——

Judge Hand: You say you have got that in a consent decree as to Ascap?

Mr. Wright: Yes. Of course, that does not adjudicate anything either; but I say that the state of the court decisions is such that that same conclusion, I think, is impelled as to the illegality of this copyright tie-in in this business.

Now, there were further——

Mr. Caskey: Mr. Wright, to put it clearly, the exhibitor to have an option to take whatever trade-shown pictures he wants.

Mr. Wright: That is right. If he wants to buy one, he should be able to buy one without having the terms of the one conditioned upon the terms of another.

Mr. Proskauer: And if another exhibitor wants to buy two or three, we have no right to say to him we prefer you over the man who wants to buy one?

Mr. Wright: That is right.

Mr. Proskauer: That speaks for itself.

Judge Bright: Did you mean your last answer, Mr. Wright? Did you mean your last answer as broad as you made it?

Mr. Wright: Perhaps I did not listen carefully enough.

Judge Bright: In other words, if one of these distributors goes to an exhibitor and asks how much he would like to buy, and he says he only wants one, do you mean to say he cannot go across the street and pick out an exhibitor who is willing to take three or more?

Mr. Wright: If the other exhibitor has complete freedom of choice.

Judge Bright: Well, he has the right of selection.

Mr. Wright: He has a right of selection among exhibitors, of course, if both exhibitors have equal rights of selection as to his pictures.

Judge Bright: The distributor can sell to whichever one he chooses.

Mr. Wright: It is not just a question of——

Judge Bright: Can a distributor sell to whichever one it chooses under those circumstances?

Mr. Wright: Yes. I had understood him to mean, can he go across the street and find somebody that he can force more

pictures on, and by using a forcing technique sell that exhibitor as against the first one.

Judge Goddard: Suppose you give us a clear answer on it, Mr. Wright. It seems to me you answered two ways to Judge Proskauer. Is it your position that if a distributor can get a customer to take five or three or four pictures instead of one, that he is not at liberty to deal with that person but he must sell to a man who would only take one?

Mr. Wright: He is at liberty to deal with anyone he pleases. The question is, what method he uses to get any particular customer to take three, four, five or fifty. That is, if he conditions the terms for the one upon terms for the others in dealing with the man who buys five, we say that he is violating the Sherman Act and the purposes of the copyright statute.

Judge Hand: Do you call it conditioning to say, "If you want to buy you must take five"? Do you?

Mr. Wright: Yes, clearly. Clearly.

Judge Bright: It is not a violation to say to him "You can buy as many as you wish"?

Mr. Wright: That is right. He can say, "You can have one, and the terms for that one are going to be the same, whether you buy one or five." The way the conditioning is handled in the trade is that he is told. "Yes, you can have one, but if you want just one it will cost you considerably more than if you bought that as a part of a group of five."

Judge Bright: Is that a violation?

Mr. Wright: I think it is, yes. That is in substance what happens.

Judge Bright: That, it would seem to me, would prohibit any merchant from selling to a big buyer on better terms than he does to a small buyer.

Mr. Wright: Well, as to what other merchants may do, I think that is another matter. I think the law is also clear that a copyright owner in dealing with copyrights does not have the same freedom of contract that somebody who deals in uncopyrighted material would have. I think the Court has clearly taken the position——

Judge Bright: Well, can a copyright owner sell for any price that he sees fit?

Mr. Wright: I beg your pardon?

Judge Bright: Can a copyright owner sell or license for any compensation that he sees fit?

Mr. Wright: That is right.

Judge Bright: Then why can't he sell to a small buyer on sharper terms than he would to a larger?

Mr. Wright: Well, it is not a question of sharpness of terms, as I see it.

Judge Bright: Well, for greater compensation, I will put it that way. Why can't he sell to one who buys or licenses one film for a greater compensation than he could sell a license to one who buys 20 films?

Mr. Wright: Well, I think that is a little different proposition than the one I asserted. I am not saying that—of course, he does not have to have uniform terms for a single picture as among all exhibitors. I simply say that in dealing with a particular exhibitor he cannot condition the terms on which he makes one copyright available to that exhibitor upon the terms on which other copyrights are to be made available to that exhibitor.

Judge Bright: Well, in the absence of any conditioning he can sell on any terms he sees fit, or license on any terms he sees fit; or am I stating it a little too strong?

Mr. Wright: I think you are. Then we run into the extent to which he can impose restrictions. If you are talking merely about ——

Judge Bright: Price.

Mr. Wright: — rental terms, price, that is correct.

Now, I wanted to point out in so far as this arbitration system is concerned, that was set up on a three-year basis and has been continued since that time by an annual extension of the terms of the Appeal Board at least by stipulation between the Government and the defendants. And as far as we are concerned, we have no desire to scrap the system as your Honor suggested the other day until such time as it can

be replaced with one which is effective; and for that purpose, even after the expiration of the three-year period we have consented to its continuance in its existing form. But in so far as the decree is concerned, at the expiration of the three-year period it is expressly stated that the whole matter is wide open for modification of any kind on petition of any party; and, of course, that is what we are here for now, to determine what kind of a decree is necessary to enforce the act with reference to all of these trade practice matters as well as to determine the fundamental legality or illegality of these defendants' structures.

Judge Goddard: Mr. Wright, I understand the term of the Appeals Board expires shortly. Are you fearful about it being extended another year or pending the result of this litigation?

Mr. Wright: My feeling is that we should extend it for six months with the understanding that the extension is without prejudice to any action that the Court may take in this proceeding. I assume there will be some sort of decision here within that time and that is why I think an extension of more than six months would not be desirable.

Judge Goddard: Is that agreeable to all counsel?

Mr. Caskey: We do not think the Government's consent is necessary. We think it is quite shortsighted to make it only six months, but we are not going to press the point. If that is the desirable interim relief, why, we are willing to have it six months. That brings us to the 1st of August.

Judge Bright: Without prejudice to either side.

Mr. Wright: That is right.

Mr. Caskey: Obviously, without prejudice.

Judge Bright: And subject to whatever decree is entered in this litigation.

Mr. Caskey: I personally think that it would be much better to make it a one-year term, subject to the further order of the Court.

Mr. Frohlich: Of course, your Honors, the three non-consenting defendants take no position whatever.

Mr. Caskey: We invite you in.

Judge Bright: We did not look in your direction at all.

Mr. Proskauer: Why not make an order continuing it subject to the further order of the Court, just that? I don't think you have to have any term in it.

Judge Goddard: Is that satisfactory, Mr. Wright?

Mr. Wright: Provided it is without prejudice, I think that is all right.

Judge Bright: I think that is fair enough.

Mr. Proskauer: You cannot prejudice us and we do not want to prejudice you.

Mr. Wright: Not much.

Judge Goddard: Mr. Caskey, will you see that an order is presented to that effect?

Mr. Caskey: An indefinite extension subject to the further order of the Court?

Judge Goddard: As stated.

Judge Hand: All right, Mr. Wright.

Mr. Wright: This decree, as I say, imposed this three-year limitation on the defendants with respect to engaging in a general program of theatre expansion, and that, of course, also expired, and there has been no renewal there.

There was an interlocutory proceeding under that when Fox and Paramount bought additional theatres during the period of the decree in what we thought were fairly substantial numbers. We brought a proceeding asserting a violation of this Section 11, which was heard upon stipulated facts there. Of course, there was no dispute as to the number of theatres they had acquired and where they had been acquired and the fact, that in the course of those acquisitions certain independent competition had been eliminated by the acquisitions.

Judge Hand: I do not exactly get your position about these five and one pictures. You say that, as I understand it, you say that it is all right to license five provided you do not insist upon it? You give the licensee an option to do something else?

that it would actually result in some loosening of what seemed to us to be a fairly rigid pattern of distribution which we attributed in part to season block selling and to the use of long term franchises.

We observed the operation of the system and were disappointed in that expectation as appears from the evidence here as to what happened with respect to distribution of these defendants' pictures in the principal cities from the period beginning with 1936-1937, the last season before the suit was filed, then 1938-1939, the last before the entry of the decree, 1941-1942, the season when the blocks of five had to be used, and 1943-1944, the last season prior to the commencement of this proceeding when they were still being used voluntarily.

Those exhibits which are in the form of admissions of fact by each of the defendants involved, I think speak for themselves.[4] They show that with the exception of RKO, which during that season 1941-1942 did license a substantial number of new first-run accounts there that it had not licensed before, there were very few changes of any kind and virtually none as between affiliated first-run operators and the RKO distribution pattern shifted back in 1943-1944 much to what it had been before.

Now another thing that we hoped this system would accomplish was a general loosening of the clearance structure by means of these arbitration proceedings, that the established rigidity which it had could be in part broken down by having these exhibitors come in and file proceedings which would result in either a reduction in the period of clearance or total elimination of it.

Very early in the operation of the system we found that while we had been careful to couch those awards in negative terms, that is, we did not provide that anybody could come in and arbitrate for the right to have clearance over somebody else, the effect of an award fixing a maximum clearance which a consenting distributor could impose against a com-

[4] Fox (Ex. 44), Loew's (Ex. 58), Paramount (Ex. 84), RKO (Ex. 95), Warner (Ex. 129).

plainant's theatre, was to encourage the imposition of a similar clearance by other distributors. We found that in certain cases, such as that involving the Bailey Theatre, which we offered in evidence here, referred to in our brief at page 109, an exhibitor might show that, if treated fairly, he would have been given a prior run over another theatre, but by virtue of circuit or distributor affiliation, the affiliated theatre was being given a prior run over his theatr with substantial clearance against him.

Now the Board found that the distributor's practice of licensing the Kensington, the affiliated theatre, on a run—I believe it was seven days ahead of Bailey—was unreasonable, and entered an award which cut this clearance to oneday. But in view of the fact that what the arbitrator and the board in substance found was really not that he had merely been discriminated against as to clearance but that actually he should, if the distributors were licensing on a fair basis, be playing ahead of the Kensington or with it, instead of behind it in response to any clearance, that award had in itself a very unfavorable aspect. Although the limitations which the board said prevented it from granting the full relief to which the exhibitor might be equitably entitled were provisions in the decree for which the Government was responsible, this did not change the fact that the result was an inequitable one.

Now that alone would not have been so disturbing had it not been for the fact that we could see the tendency of these awards to fix a pattern or status which other distributors would follow—that is, you saw what happened here with respect to Columbia, which was not then even licensing this other affiliated theatre. Bailey was being licensed clear of the Kensington theatre by Columbia. But when that award came down, then Columbia immediately introduced a discrimination in its license agreement that had not even been there before, a provision to the effect that if the affiliated circuit bought Columbia pictures for the Kensington, the Bailey would have to play one day behind it just as it did on the other distributors pictures.

Now I am not going to go into the Appeal Board decisions or awards in detail. We offered you those which we thought were sufficient to show the inadequacy of the system to give the relief that the Sherman Act requires.[5]

Another adverse aspect of the situation, I think you can see from a mere reading of the award in the Overton, Texas, case.[6] That is where a theatre affiliated with Jefferson Amusement Co. which is 50 per cent owned by Paramount operated the only theatre in the town. There were two of them. One burned down. They took their time about rebuilding. The citizens of the town decided they wanted to have their own theatre there and they built, as the arbitrator found, a very nice theatre for the town. Then the Jefferson Amusement Company proceeded to remodel a store, opened what is called a store show, and the new theatre found that it could not buy pictures from these consenting defendants except on a second run because the Jefferson Company absorbed all their first-run product between the two theatres it had, and these people were then permitted to buy a second run of the pictures, playing them 30 days behind Jefferson, and Jefferson further made the situation a little more acute for the local owners of the new theatre by cutting the first-run admission price of one of these theatres to exactly the same price as the independent was charging, so that they had the characteristic situation where the independent takes his most severe beating with the affiliated theatre playing the pictures at exactly the same admission price with substantial protection in the form of clearance over him.

Now, he arbitrated and got an award to the effect that the clearance was unreasonable, and it was cut from 60 days to 14 days. But in our view that kind of a secondary position really does not satisfy the requirements of the Sherman

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[5]See Appeal Board Decision Nos. 27 (Ex. 2); 52, 58, 63, 65, 67, 70, 72 (Ex. 3); 87 (Ex. 4), 109 (Ex. 291) and 111 (Ex. 292); Arbitration Award Nos. 14-1fh-42 (Ex. 293), 1-18D-41 (Ex. 294); 20-1H-42 (Ex. 297); and 7-4f-41 (Ex. 298).

[6]Arbitration Award No. 7-4f-41 (Ex. 298). Shows that clearance originally imposed was 60 instead of 30 days.

Act as to what relief the independent would be entitled to have on the basis of the facts that appeared there.

Judge Bright: Why doesn't it?

Mr. Wright: Well, if the Court please, the mere fact that somebody else in the town happens to be there first does not in our view mean that when a new theatre comes in it should not have an opportunity to bargain for pictures free from restrictions imposed in favor of the existing theatre. That is exactly the difference between the position of these defendants as theatre operators in a small town of that character and the position that you or I might occupy if we were operating the only theatres in the town. I agree that the mere fact of sole possession of physical facilities in any location does not mean a monopoly. It is only when you couple it with the power to exclude others from the business or the right to restrict their activities.

Judge Hand: What is the restriction here you are talking about?

Mr. Wright: The film licensing control which Jefferson Amusement had in that case by virtue of its affiliation with Paramount.

Judge Hand: You mean that it had some provisions as to second showings? That it should not have any? That it should have just its trade run provision? Is this going back to your argument now, or your main position, I mean?

Mr. Wright: The facts that occurred there merely illustrate to us the inadequacy of any scheme of relief which simply results in changes of status within an established clearance system, and does not actually give an opportunity for a full and free competition between theatres in licensing films.

Judge Hand: Well, you really do not want them to have any freedom of contract.

Mr. Wright: We want them to have complete freedom of contract.

Judge Hand: Well, I know. You say so. Here was another contract that somebody had with a customer first, and you do not like that.

Mr. Wright: Well, the contracts are, of course, repeated. This was under selling in small groups. The clearance, of course, while nominally renegotiated with each group actually continues in effect, but there was no existing contractual arrangement which would have prevented these defendants from dealing with this new exhibitor on a competitive basis had they chosen to do so; but they chose to protect the affiliated account against that competition.

Judge Hand: Well, that it is. That is what I say. You object to any tendency to stick to their customer. That is really it, isn't it?

Mr. Wright: Sticking to customers is one thing.

Judge Hand: Well, what more?

Mr. Wright: Licensing customers restrictively is something else.

Judge Hand: What was the restriction there? Too long clearance?

Mr. Wright: The fact that if the theatre had gotten the kind of a deal that it would normally be entitled to, it probably would have licensed ahead of this little store show that Jefferson opened in order to use up the product; and yet the limitations of the decree were such that the Arbitrator could do no more than mitigate the existing clearance situation and cut down the time interval, leaving the independent in the position of playing the following run at the same admission price as the affiliated first-run, which is ordinary competitive murder.

Now, I want to say something about one provision of the decree which did what we hoped it would do, and that was Section 6, which provided the so-called some run provision. What gave rise to that was this: Of course, the most extreme form of clearance restriction is where the distributor says to a competitor, "I am not going to license you pictures at all. I already have a first-run account in this town. I think the town is so small, or the situation is such that if you exhibit my pictures at all you are going to injure the first-run situation. So I won't sell you."

Well, in order to take care of that situation, Section 6 was inserted in the decree which provided that anybody was entitled to some run of pictures from these defendants at terms to be fixed by the distributor, with the only proviso that the terms should not be calculated to defeat the purpose of the section; and if the distributor could show that the effect of licensing the additional run would diminish his over-all revenue from the area, he could refuse to license. In all of the cases that were brought, I know of no instance where that showing was made.

That provision did open up areas where runs had been refused before and did create, we felt, a new competition that had not been there before.

The difficulty that arose there was the limitation of the award. The award was that if the arbitrator or board found that distributor had been refused a run contrary to the section, then the distributor was simply ordered to make him another offer, and then if the offer was unreasonable in any of its terms, the exhibitor could then go back and arbitrate again. Well, after you have two awards and a couple of Appeal Board decisions, the thing is liable to become endless, and, in particular situations, you reach the point where you might have to have somebody actually arbitrate rental terms before you could get a fair solution. But for the most part we feel that that section worked and was effective in prohibiting that extreme form of discrimination, where the distributor does not impose merely unreasonable clearance terms, but simply says, "You cannot buy on any terms."

I have pointed out the manner in which the consenting defendants were dismissed from these proceedings. We tried the Crescent case with all the other three defendants in, and two were dismissed by the Court, one was held.

In trying the latter cases it was apparent to us that the more appropriate forum for relief against these defendants as to their distribution practices as such was really here where it could operate on a general basis rather than in those proceedings, and they were accordingly also dismissed

out of those suits, that is, the Griffith and the Schine cases. That was on our motion.

I want to state further that at the conclusion of the three-year period we, of course, again made an effort to see what could be done by way of modifications which would relieve ourselves and the Court of the burden of this litigation, and we filed formally in August 1944, a proposal to modify the consent decree, which set forth the provisions we thought it would have to have in order to make it effective. That was done when we had exhausted all possibilities of agreement. After we filed the petition here, we offered the defendants the opportunity to litigate the relief question, if they so desired, without any adjudication of law violations, if they were willing to assume law violations for the purpose of hearing the relief questions, because, as we viewed the matter, there could not be further substantial relief without either admission of violations or adjudication of them. That offer was declined by them and it then became necessary to set the matter down for hearing.

We again went in on a preliminary motion as to clearance relief before Judge Goddard, and that resulted in further efforts, which were unsuccessful, to compose differences and work out some kind of decree which would make what we were doing here unnecessary.

Now, the reasons——

Judge Hand: Of course, we don't know—I don't know whether we possibly should know—what these negotiations were about. I really don't understand them. I suppose they were about some kind of modification of the decree.

Mr. Wright: Well, the fundamental stumbling block in our negotiations was that the defendants insisted on further postponement of litigation of the fundamental question of legality of their structure as a condition of modification, and we had reached the point where we felt that question had to be decided.

I simply want to point out that one of the reasons we are here, of course, is the fact that the only supporters of this decree or this method of regulation, as it now is, at this time,

in the light of the five years experience, is the defendants themselves. There is no one who has been satisfied by, its operation in other elements of the industry, and the Government itself is satisfied, on the basis of experience, that it simply does not perform its job of enforcing the Sherman Act. Under those conditions, we, of course, have no choice but to proceed to get these matters adjudicated which are the subject of a widespread and, we think, legitimate complaint.

In that connection I might say that the general character of these complaints, in so far as small exhibitors are concerned, is largely that in this kind of restrictive system, their bargaining power is such, by virtue of their size, that in any event, under any scheme of regulation, so long as its fundamental administration is in the hands of the theatre-owning defendants, they come out on the short end, either in film rental terms, or in one manner or another. They have no protection, of course, against inroads in such territories as they may be operating. The theatre-owning distributors are, in effect, looking down their throats as competitors because of their right to audit the receipts of their businesses as a result of licensing them films on percentage terms. None of these exhibitors regards these arbitration rights as compensation for the absence of a right to do business in a free market, and we are not in a position to tell them that they do provide such compensation.

As far as your independent producer is concerned, it is perfectly true that there are many more independent producers now than there were before. We think the decree has resulted in improving the opportunities for independent producers to have their product exhibited, but the fact remains that they find themselves selling in a market which is controlled by their competitors, and they complain about that control.

Judge Bright: Aren't all markets controlled by competitors?

Mr. Wright: Not by the kind of concerted action that is involved in this case. That, of course, is fundamentally what this case presents.

Judge Bright: What do you mean by "concerted action involved in this case"?

Mr. Wright: Well, the market here that you are dealing with is admittedly a protected market. That is what every one of these defendants says is the fundamental purpose they had in gathering together these aggregations of theatre circuits which they have brought under common control, and they make no bones about the fact that as far as theatres affiliated with them, regardless of degree of affiliation, those theatres constitute a market as to which they have priority for their films.

That kind of market protection is the product of concerted action. It isn't, in our view, the kind of market protection which is possible under the Sherman Act. These people who complain about it, assuming that they may be wholly wrong in thinking that they might be able to do better in a market in which there is free competition than one which is protected by the existence of these various combinations, still have the right under the Sherman Law, as we understand it, to do business in a market which is free from protection of this character, achieved by the means that have been shown here.

Judge Bright: I still wonder if you mean by "concerted action" the effort on the part of each of these distributors to buy theatres for the exhibition of their product? Is that what you mean by "concerted action" and "protected market"?

Mr. Wright: That is the primary means of protection, the collection of these theatre circuits under their control.[7]

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[7] A brief history of the acquisition of stock interests in theatre circuits by each producer-exhibitor is found in their answers to 1939 Interrogatory No. 58. These are contained in Ex. 45 for Fox, Ex. 48 for Loew's, Ex. 85 for Paramount, Ex. 91, 98, 101 and 107 for RKO and Ex. 116 for Warners. Stock affiliation is only one method of assuring such protection as shown by Ex. 474, a 10 year franchise expressly restricting playing time available to other distributors in Paramount Theatre at Los Angeles, which is operated by Partmar Corp., a corporation in which neither Paramount nor any other defendant owns stock.

A secondary means of protection is the establishment of a pattern of theatre ownership, which amounts to a virtual territorial distribution among them, so that each of them does exercise in many areas a 100 per cent control, in others a very high degree of control, as exhibitors, over the fate of any film. Now, the combination, the concerted action, of course, does not stop with the aggregation of these theatre circuits into a market for the films of the particular distributor affiliated with them or with the mere territorial division.

Judge Hand: Your theory is that if they find a place where there isn't so much competition by powerful interests, they ought to go there, or, rather, that they ought not to go there, they ought to go to the place where there is the most active competition? They cannot go to this other place either because they have a monopoly or because they would be in a position where the competition would not be as powerful.

Mr. Wright: Well, the affiliation and general pattern of theatre control is such that in many areas, or most areas, there is no competition among theatres for their films.

Judge Hand: I know, I understand those particular towns referred to.

Judge Bright: When you say there is no competition, Mr. Wright, do you mean because they own, say, all the first-run theatres in a given city, there is no competition?

Mr. Wright: That is right, as theatre outlets for films. I did not invent the term "closed situations." Mr. Frohlich, counsel for Columbia, referred to those situations as closed first-run situations. In those he said he had no choice of outlet.

Judge Bright: That would be so, say, if there were three first-run theatres in some particular community and each one was owned by a different distributor.

Mr. Wright: Yes—well——

Judge Bright: There would be concerted action or a protected market, as you call it.

Mr. Wright: The market is, because of the manner in which these various combinations behave vis-a-vis each other,

actually protected even in the situations where there may be two of them in nominal opposition, that is, in the larger cities there are a large number of situations where two or more actually have theatres, but we say that on this record it is perfectly clear that in those situations there is no competition between them as theatre operators when it comes to licensing films. They are, of course, both selling entertainment to the public and are standing there competing with each other in that sense, but in the sense of representing alternative markets, or customers, for a distributor's films, that situation doesn't even prevail there.

And the reason for that lies in the very character of the practice, the licensing practice, which they carry on with each other—the constant and habitual use of theatres affiliated with one distributor as prior-run outlets for the films of another. That is, you do not have simply a showcase operation in any sense of the word. All of these distributors use outlets of other distributors for showcase purposes in some situations and their own in others; and it is not just a matter of using each other's outlets as a means of making sales to the public. The express agreements that they make with each other do much more than that. They provide express restrictions as to what can be done with their pictures by way of the terms on which they may be made available to others in the same area. They agree to impose substantial clearances; they fix admission prices that each is to charge, and the same distributors, of course, go further and in the contracts of such independents who may be attempting to compete on later runs, include price-fixing provisions which are calculated admittedly, to prevent a diversion of patronage from these prior-run theatres and which serve the express purpose of protecting them from theatre operating competition as such.

Judge Bright: Well, you have stated that there are express agreements among the distributors in a situation of that kind——

Mr. Wright: Yes.

Judge Bright: Do you have any particular reference to some such express agreement?

Mr. Wright: The ordinary license agreement.

Judge Bright: By "express agreement" you mean, then, the license agreements that they submit to other owners?

Mr. Wright: The restrictions are accomplished both ways, both by the license agreement, that the affiliated units——

Judge Bright: What I am trying to do is to make a distinction, if there is any, between an express agreement between two distributors to do certain things with reference to other exhibitors in that area, or to refer to the express agreement as relating to the license agreements which are issued by these several distributors to other exhibitors in that area.

Mr. Wright: I am referring to both the license agreements which the defendants make with the affiliates of each other and with independents—let us take a concrete example. In selling first-run Philadelphia, these defendants make a license agreement, as distributors, with the Warner Bros. Circuit Management Corporation, or whatever Warner subsidiary buys the films for that area, in which there is an express agreement as to the terms on which those films licensed will be made available to other exhibitors in a very wide area. For example, that Warner first-run clearance that is incorporated in those agreements gives first runs in Philadelphia priority over the entire State of Delaware and many counties in Eastern Pennsylvania, a large number in New Jersey. Now, that kind of agreement where you have the use of a common first-run outlet both by Warner for its own pictures and by another distributor for his pictures in which they apply the same clearance and establish the same restrictions, is, in our view, very clearly an effective agreement between those two producer-exhibitor defendants both as distributors and as exhibitors to restrict competitive opportunities of other exhibitors in the area involved in licensing and exhibiting the films of both.

Judge Hand: Of course, you want to upset the whole arrangement, what you call the general pattern; but you do

not seem to pay any attention to local situations except as evidence of something larger. I do not know whether you do or not. I do not know whether you make any real complaint about Albany and other places, or whether you merely think they are sort of malignant symptoms.

Mr. Wright: I think that the latter is a more correct description. As to the first-run Philadelphia situation, for example, now, it is perfectly true that for a long period of time Warner had a hundred per cent first-run monopoly position in the town, because Fox leased its first-run theatre there to Warner for operation with a film franchise, and Fox was the only other producer-exhibitor who owned a first run theatre there. Now, even when that situation expired and Fox took its theatre back, in our view that situation actually is no more competitive today than it was then from the standpoint of the opportunity of an outsider to enter into that market either as a distributor or as exhibitor; and it is for that reason that we have not tried to center your Honors' attention on these particular pooling agreements which expressly accomplish an elimination of competition which we say is inherent in the nature of the structure of these defendants and their film licensing practice in any event.

Now, those agreements are clearly illegal, per se, and should be enjoined.[8] As Judge Proskauer indicated, he would be delighted to have you do that. That would not upset——

Mr. Proskauer: I would not say delighted.

Mr. Wright: Well, it would not upset the defendants' control of the market in any way, and that is really what is in issue here, market control; not just individually exercised market control but market control where each group supports the other's control by express agreement.

Judge Bright: Each time you refer to express agreements, you do not mean agreement between the defendants themselves but agreements by which they license affiliated theatres on a certain basis?

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[8] Shawnee Compressed Co. v. Anderson, 209 U.S. 423; U.S. v. Union Pacific RR Co., 226 U.S. 61.

Mr. Wright Reply on behalf of Government

Mr. Wright: Well, in some cases those are agreements between defendants and in some cases a defendant and a defendant's affiliate are involved. That is, Warner Bros. as a distributor may make an agreement with Loew as an exhibitor, both of whom are defendants in the case. In another case, the agreement might be made with a Loew subsidiary. I do not make any particular distinction between agreements actually executed by a defendant or somebody that a defendant controls or is affiliated with by virtue of operating agreements or stock interest.

Mr. Proskauer: You mean license agreements.

Judge Hand: Well, we will adjourn now until 2.15.

(Recess to 2.15 p.m.)

AFTERNOON SESSION

Mr. Wright: If the Court please, we were discussing before lunch the nature and character of the agreements that these defendants make with each other, and as far as I am concerned, I am going to devote the rest of the time here principally to attempting to make clear to the Court, if I can, the fundamental nature of this business and how it works. As far as the legal analysis goes there isn't anything I can contribute other than to cite the cases to you as they explain themselves. But the understanding of this industry's structure and how it got that way and how it works is really vital to doing anything in this case.

One important fact that I think has escaped the Court's attention—and it is vital to the whole case—is the fact that the whole structure of clearance and admission prices is one that consists of a licensing practice where one is geared to the other—that is, your time intervals are functions of admission price differentials and vice versa; and that that is not accidental and it is not the result of the exercise of individual judgment by distributors, but it is a product of express

agreement and uniform adherence to that pattern—knowing adherence—over a substantial period of time.

Judge Hand: Supposing you had no clearance at all, took it out, forbade it, where would that leave you? Everything else the same.

Mr. Wright: If you left the theatre structure as it is, in so far as the ability of the producer-exhibitors to control this market the great danger is that it would do nothing at all. They would continue without the benefit of any express licensing restrictions to give each other exactly the same preferential treatment that they do today.

I merely want to point out that the significance of the licensing agreements and the licensing practice lies largely in the fact that it shows how this got where it is, that clearances and admission prices are not something handed down from above, they are not fixed independently by anybody. They are the product, have been the product, of systematic agreements between the parties involved.

Now these agreements which accomplish this dual purpose of fixing the prices at which these various runs occur and the intervals between them are all ostensibly based upon copyright privileges. You can't possibly justify the kind of price fixing for the purpose of diverting business from one unit to another that goes on in this case without resort to the copyright statute; and the fundamental issue of law that is presented here is a proper interpretation of that Act.

Now just let me give you an example of what would happen if you accepted the defendants' claim that they have got a perfect right as property owners to fix these admission prices for exhibition of their products independently of copyright privileges. They would say, that as the owner of a theatre, as the owner of the property can always license it for a percentage of the gross receipts that it yields; it is done every day in leases. All right, let us assume that up to that point you can do it. Now, does that give the owner of a theatre the right to fix the admission prices that the operator of the theatre, his lessee, may charge because he fixes his rental

in terms of a percentage of the gross receipts? And go a little bit further and take two theatre owners who are also engaged in theatre operation. Can one of them lease his theatre to the other as an operator for a percentage of the gross receipts and then fix the minimum admission price at that theatre, while the other theatre owner leases his to the first one as operator for a percentage of the receipts and fixes the admission prices of that theatre? And then, can they go further and in leasing other theatre property to so-called independent theatre operators fix the price which they shall charge for their entertainment, so that the patronage will not be unduly diverted from the other theatres in which they have an interest both as theatre operators and theatre owners?

It does not require any citation of authority to show that that kind of price fixing is illegal per se when you are dealing with prices which are charged or affect any commodity which moves in interstate commerce, as films do. The only way that you can possibly justify this whole restrictive licensing scheme is to get it in under the Copyright Act.[9] And the reason you cannot get it in under the Copyright Act, in any circumstance is because, in any view of the case, these defendants as copyright owners when they are fixing a theatre's minimum admission price, are not fixing the price of the property that they happen to own; they are fixing the price that a theatre operator charges for an entertainment to which they contribute one element in the form of a positive print that he can run through his projection machine for the purpose of throwing on the screen a feature which is a part of the entertainment for which the price is paid.

It is perfectly clear, it seems to us, from any examination of the cases we have cited in our brief that you cannot possibly sustain restrictive licensing of that kind either when done individually—unilaterally, that is, by a distributor; of

[9]See RCA Manufacturing Co. v. Whiteman 114 F (2d) 86, 89 (CCA2) cert. denied 311 U.S. 712 to the effect that common law rights in copyright material are completely surrendered when owner avails himself of privileges granted by copyright statute.

course it is not done individually when he makes an agreement—or whether it is done as it is here as a part of a general scheme to control a market.

We gave you the statistics which showed the extent of the dominance and the position in the industry of the various units that are involved here, not for the purpose of proving any conspiracy or concerted action in themselves, because they obviously do not do anything of the kind. For that we rely on the actual facts in the record as to what these combinations consist of and the express licensing arrangements they make with each other. That furnishes the concerted action.

Judge Bright: You said on the evidence in the record and the licensing agreements.

Mr. Wright: That is also in; I did not mean to imply that those were not in the record. I was referring to two kinds of evidence of concerted action, one kind—

Judge Bright: You rely on licenses as one evidence of concerted action. What is the other?

Mr. Wright: The other is the actual control through stock ownership and operating agreements. Under the Sherman Act the form that the combination to restrain trade takes is utterly immaterial. You can group your corporations together for a common purpose either by express agreements, a stock pooling arrangement, or simply by pursuing knowingly a common course of action to a common end.

Judge Hand: I do not know what you mean by stock ownership arrangement. Are you referring to the subsidiaries, the companies in which the main defendants have an interest? Because there is no stock ownership arrangement as between one another.

Mr. Wright: Well, that last statement needs to be qualified. There is a stock ownership by these defendants, two or more of them, in certain exhibitor corporations. That is, the Buffalo Theatres, Inc. which operate theatres in Buffalo is 40 per cent owned by Loew and 40 per cent by Paramount.

In addition to those stock ownership arrangements, there are situations such as Atlanta where Loew's move-over house

there, the Rhodes, is operated by Lucas & Jenkins, which also operates the Paramount house there; and in the Rhodes Loew's has 50 per cent of the profits.

Judge Hand: Maybe if that is an abuse it should be broken up, I don't know. You are not interested in that apparently at all.

Mr. Wright: We are vitally interested in it, but we are interested in it principally as evidence of the manner in which these people work with each other. We say—

Judge Hand: I know, but nobody is vitally interested in evidence alone. I mean, at least I am interested in some result that it may point to. Now, you say that the only significance of the thing—we won't use the word "interest"—the only significance of the thing, as I understand it, is evidential.

Mr. Wright: That those agreements are in themselves illegal. We assert that. We say further, however, that if you confine your relief in this case to merely prohibiting express agreements of that particular character, or implied agreements of that particular character, you do not change the fundamental restraint of competition in this market which results from the structure of each of these defendants as such and their constant dealing with each other as preferred outlets for each other's film.

Now, as I was pointing out with respect to this element of dominance, that is an important element in Sherman Act cases in considering what should be done or what the economic effects of a particular practice are. We pointed out to you by those statistics the fact that these five producer-exhibitor defendants, if you consider them individually, are the five largest theatre circuits in the country by far. The figures as to the next largest independent circuit show the total rentals that they paid to be, I think, 10 or 15 per cent only of those paid by the RKO circuit, which is the smallest of the so-called Big Five.

Now, as distributors, they are also the five largest units in the industry in terms of the film rental dollars that they take in.

Now, the significance of that dominant position here is not merely that you have these five large units. In any industry you will find four or five leaders, or maybe two or three; but that dominance here is arrived at and maintained by mutual support, by the constant making of agreements with each other which restrict the trade of their competitors. For example, Paramount and Loew, as theatre operators in Atlanta, where they have only, I think, six or seven theatres between them—they are the first-run theatres—take out of that town in excess of 70 per cent of all the film rental that is paid by it, and that film rental is a fair reflection of the total receipts that are paid for the privilege of seeing pictures in Atlanta. Now, they are not able to achieve that degree of success in Atlanta simply by being the owners of fine theatres there. They are not content to rely on such superiority over other theatres in Atlanta, the 40 or 50 others, that the physical quality of their theatres or the ability of their management might give them. They go further, and in licensing their films to those theatres make express agreements which have the admitted effect and purpose of seeing that receipts from the area are channeled into their theatres and not diverted into the other 50 or 60-odd in which they do not have financial interests.

And they do that by agreements which expressly restrict the terms on which these films are to be made available to other exhibitors in Atlanta, and they go further and in their agreements licensing those films to those exhibitors actually fix the minimum admission prices which they can charge.

Judge Hand: Are their theatres better?

Mr. Wright: I don't think there is any evidence that they are. The Rhodes is a very small theatre. As to the move-over houses, we had testimony it only became a move-over house when they got a half interest in the operation, and that is characteristic anywhere. I think I took the witness Rodgers over the Columbia Theatre situation in Washington, D. C. a move-over house, and the witness described it as a small unprepossessing theatre.

The physical quality of the theatre does not determine in any way where its playing position is going to be in any particular area. That is determined by agreement.

Judge Goddard: Isn't that a pretty big statement? The defendants say that the distributor picks out the best theatres. You say it makes no difference.

Mr. Wright: I say the best theatre in any particular situation from the standpoint of revenue capacity is not just a function of size or location. Revenue-producing capacity is a function of the kind of restrictions that you impose to protect the patronage of that theatre just as much as it is of its size or physical capacity.

Loew's for example uses very effectively a small unprepossessing theatre, the Columbia, as what is called a continued first-run, a move-over house. When it gets through playing in their big house they put the picture over in this house and play it at the same admission price. They have got a low operating cost and they can give it additional playing time and they find it profitable to use it that way, and of course it has the first-run protection that the other first run houses have there in Washington in the films they show not being made available for whatever the first-run clearance period in Washington is. I think it is 21 days.

Judge Proskauer: May I ask if Mr. Wright did not concede at page 2451 that Atlanta was not typical of a general situation?

Mr. Wright: The only concession I made was that as to Atlanta the theatre pattern was different from other situations. You don't find the same theatre pattern in Atlanta that you find necessarily in other towns. You may find a different pattern of theatre ownership in every town in the country, but for our purposes that is completely immaterial. What you do find is that where these defendants have theatres—I don't care what kind of a theatre it is, whether it is a big one or a small one—you find them not only using each other's theatres as outlets for their films but you find them pursuing a deliberate conscious licensing practice which

gives those theatres a prior playing position in the area where they operate and protects them from diversion of patronage by the price and clearance restrictions that are applied generally in the area both to defendants theatres and to other theatres.

Now the mere fact that the same kind of price fixing goes on in areas where only independent theatres operate or that in many cases they also license independent theatres in the areas where they operate does not for a moment rebut the inescapable fact that their position in the industry in terms of the film rentals they are able to pay as theatre operators and the receipts they are able to take in as theatre operators is a consequence of more than the mere physical ownership of property. It is a consequence of this systematic restrictive licensing practice which is calculated to produce exactly the results it does produce and keep these people on top of the business.

This question of how these agreements are made, that is, who first suggests what an admission price shall be, or whether or not the price is one customarily charged by the theatre, in my opinion are wholly immaterial in determining whether or not you have got a price fixing conspiracy that is illegal. The fact remains that you have a price structure controlled by agreement among competitors. These license agreements of the defendants expressly fix admission price and clearance by the very language of the printed form, which is that one method of penalizing price reductions is a corresponding reduction in clearance.

What was done in the Interstate case is simply a clear example of using your clearance and price restrictions to intensify the discriminatory quality of that control by eliminating price differential based on a difference in playing position. In that case the subsequent-run competitors of Interstate normally charge 15 or 20 cents and they play 7 to 14 days behind the Interstate subsequent-run theatres which charge 25 cents admission. Obviously, one way to be sure that they were less competitive, was to persuade the distribu-

tors to move up their minimum price to 25 cents in the independent contracts and keep the existing differential in time—the clearance interval in favor of the affiliated theatres, and that is exactly what was done with the effects that were noted by the Supreme Court.

That is only one way to use these restrictions to get at a competitor.

Another thing that you as an exhibitor can do to your competitor, is to provide in your license contract with a distributor that if your competitor plays at the same admission price you shall have protection over him. In either event you come out the same way.

Now there are express agreements in this record made between defendants in this case which say exactly that, and I pointed to one series of them in our brief (pp. 53-54) made with Warner theatres in certain towns in Wisconsin, where these distributors made an express agreement with Warner which says 30 days clearance over all theatres charging the same admission price as the Warner house, and an additional clearance if there is a differential, and so on down the line.

Now although that agreement I think is clearly illegal in itself on the basis of Judge Proskauer's concession yesterday, we don't make any special point of agreements of that character as a basis alone for relief, because even if you enjoined each of these distributors from making an agreement of that character with Warner in those towns or anywhere else, as long as you permit them to use those Warner outlets there as the first run outlets for their films they can and would without any express agreement give Warner the same kind of a preference by the manner in which they made their prints available.

Now, your Honors have been led to believe, it seems to me, by the discussion of these defendants, that you cannot have such a thing as run, or intervals between runs, or multiple runs unless you have clearance and admission price fixing agreements. That is utter nonsense.

You can go into any area as a distributor and decide to sell just as many runs as you please. In Kansas City, for example, the Fox theatres play simultaneous first-runs in three theatres on some occasions, one small one downtown, a big one in another location, and another smaller one out in a suburban area. Then they go into an exclusive second run and an exclusive third run at Fox theatres. Then they go out to independents. Your pattern varies from town to town. In a place like Baltimore, where there are only affiliated theatres which are first runs, when it gets through with the first runs, it may go into twelve or fifteen houses.

Mr. Caskey: What was that statement?

Mr. Wright: I say, in a city like Baltimore, where you have only—where the only affiliated theatres are first run theatres, I believe, with the exception of one Loew theatre, which plays an exclusive second run on some Loew pictures, 21 days, after first runs the films can go into a large group of independent theatres in Baltimore, all of which may play at approximately the same time or simultaneously. That is what is known as an open booking, or day and date, basis. On some pictures some of these exhibitors may play first, and on other pictures others may play first, but the general playing position of all of them is about the same.

Judge Hand: What does that day and date mean?

Mr. Wright: Generally simultaneous exhibition. That is, of course, you have to have more prints at that stage of release than you do at the earlier stage. You serve, generally speaking, you serve more and more theatres simultaneously as you go down the run sequence. The print limitation, of course, is one that is wholly within the distributor's control. He may make up just as many prints as he thinks he can profitably use. He serves, of course, forty or fifty theatres with each print.

The fact that one theatre pays less than the cost of the print is of no significance whatsoever in determining print use. And in using his prints in a way that he thinks is most profitable, he does not have to make an express agreement

with any exhibitor in the area as to when he is going to make prints available to somebody else. All he has to do is to make an agreement with the exhibitors he licenses as to when he is going to make prints available to them. That does not require the use of the kind of restrictions that are employed in this business at the present time, and I think if you will look at the nature of those restrictions, and at their history, you can see that their purpose is not primarily one of an efficient distribution of the distributor's product but it is a matter of restricting and controlling theatre competition in an area.

When it comes to admission price fixing, he can license his films certainly for a percentage of the gross receipts and still do business without insisting that the licensee charge a specific admission price at his theatre. Neither of those gentlemen is presumed to be an idiot. He makes the contract with the exhibitor who normally would be expected to charge a price which will result in the maximum gross return, to his theatre while the film is playing there.

Judge Hand: But I should suppose the thing could be done perfectly well in another way, if they wanted to do it. They could provide that, instead of fixing a minimum price, they could provide some kind of rental, some kind of minimum rental, some kind of a guaranteed thing, which would require them to charge that price without saying so, and it would be perfectly proper, doubtless, to do that.

Mr. Wright: I see no reason why they cannot agree on a flat rental, if they want to, and, of course——

Judge Hand: It could be a flat rental with a sliding scale.

Mr. Wright: Yes, and in making such an agreement they would always, naturally, take into consideration what kind of a theatre they were licensing, and one of the qualities of the theatre you license is the admission price it charges.

Judge Hand: Is this anything more than a form?

Mr. Wright: Well, if the Court please——

Judge Hand: Formality, as to which way you do it?

Mr. Wright: I think it clearly is. The vice of these agreements is that they do place the exhibitor in a position where he has to maintain the price, come what may, and they do not do it with reference to just one picture, and it isn't in relation to the quality of the picture at all.

Judge Hand: He would have to, under my assumption, or else go broke, or else not make the contract, one of the two.

Mr. Wright: No, under your assumption, if your Honor please, you would have a much freer distribution of films than you have today. If a bad picture came along, it might not be played at a standard price. Presumably it might be reduced to a price which would yield greater returns.

Judge Hand: You are coming to something else, I think, and that is the combination of these different pictures. You do not like that. That is another story.

Mr. Wright: They cannot; it is not another story, if your Honor please, because it is all done together. You have got to view the transaction as a whole. You cannot view it as a restrictive licensing practice that might theoretically exist. I think you have to look at what they have done and the way they do it is to tie a group of copyrights together into a single agreement and make these stipulations for the entire group, and even when they use small groups, instead of season groups, they continue the same restrictions from group to group. So that what you have got is a use of the restrictions to fix theatre status and restrain theatre operating competition instead of the primary service of the distributor's interest in film rental as such, which he can serve perfectly well by controlling the use and disposition of his prints and his license terms and terms of percentage or flat rental without regard to agreements of that character.

The significance of the agreement element is that it shows the purpose of this system that has been built up.

Now, the letter that O'Donnell wrote to all the distributors in the Interstate Circuit case, when he said, "I am not going to buy your films and play them at 40 cents in my

first-run theatres unless you agree that you won't show them at these other houses at less than 25 cents" is obviously an element of negotiation; a threat not to buy the film except on the terms offered is implicit in any kind of bargaining, whether you have a letter from the exhibitor or whether you do not.

The testimony that was given in this case in which the defendants attempt to explain uniformity of clearance is simply based on the proposition that they say, the exhibitor says this is the kind of clearance he gets from distributor A and he wants it from you, distributor B. Well, what is your alternative? The alternative is, of course, if you do not give it to him he does not buy your film.

Now, I think it is apparent on this record that if you look at the picture as a whole you can see what could not be made apparent in any of these cases where you had nothing but a local system involved, that the very purpose and effect of the system, as such, is a means of restraining theatre-operating competition and wholly outside any purpose of the Copyright Act or any privilege which the Copyright Act grants to anyone.

Now, I do not propose to attempt to analyze for you these copyright and patent decisions. All I want to do is simply call your attention to an additional one which came down the other day, which you can of course read for yourselves; and that is one referred to in Mr. Frohlich's brief called Scott Paper Co. v. Marcalus Mfg., decided November 13. Now, that case is to me a perfect illustration——

Judge Hand: Where is that referred to?

Mr. Wright: I believe it is in Mr. Frohlich's brief. There is no citation for it yet, because it was just decided November 13th.

Mr. Frohlich: It is 90 Lawyers Edition, page 88, on page 25 of the Columbia brief.

Judge Hand: Yes, I see it.

Judge Bright: What was that case? I have read it but I have forgotten. Just what was it?

Mr. Wright: It involved an infringement suit brought by an assignee of a patent. Marcalus had invented or said he had invented a paper-cutting machine which he assigned to his then employer. He then went into business for himself in opposition to the employer and he built a machine which was substantially the same as the one he had gotten the patent on, but which was an exact copy of one on which a patent had expired. When his former employer, the assignee of the patent, sued him for infringement, although he was estopped to attack the validity of the patent, because in assigning it he had represented that he had patented something, he was able to defeat the infringement action by showing that all he did when he made this infringing machine was to copy the prior art.

Now, the application of the ordinary doctrine of equitable estoppel that prevails in any other transaction or dealing with any other property would clearly have prevented him from prevailing with that defense; and yet the Third Circuit Court of Appeals and the Supreme Court let him prevail on the ground that the interest of the public in having free access to an expired patent was so much greater than any considerations of private contract, that he should not be held to have infringed when he merely copied this expired patent.

Now, that provoked a very sharp dissent by Mr. Justice Frankfurter, which merely points up the extreme lengths to which the Court has gone in insisting on interpreting the patent and copyright statutes with emphasis on their public purposes, just as interpreting the Sherman Act it subordinates claims of private injury to the public interest in maintaining business competition. The theory on which it seems to me it is proceeding in copyright and patent cases is that when you secure the benefits of a public grant of that kind, the possibilities for abuse are such that you are held to a higher standard or different standard of performance in dealing with it than somebody who might just be selling cheese.

Judge Bright: How far can they go under this Copyright Act, do you think? They can sell their product, surely.

Mr. Wright: Well, the outright sale presents no problem——

Judge Bright: They can license their product.

Mr. Wright: The problem here arises in connection with licensing restrictions. I think it is perfectly clear that in so far as you are licensing not a mere performing right but are renting a print, that you certainly cannot go beyond simply specifying how much money or the kind of flat rental or percentage terms that the fellow who uses it is going to pay you for the use. I do not think you can attach to his use restrictions of any kind which tend to prevent the use by others of the copyrighted product, prevent the user of a copyrighted product from using such other material of any kind, copyrighted or uncopyrighted, patented or unpatented in conjunction with it, or from operating his theatre business in any way that he pleases. That is, the mere fact that it makes it more profitable to you as a copyright owner to control an exhibitors activities as a theatre operator does not at all give you the right to incorporate in the provisions of a license under which you grant him the privilege of using the print provisions such as those you have here, which fix the price he charges for his whole entertainment and fix the terms on which you can make a print available to his competitor.

Judge Bright: Well, suppose A licenses the use of that feature to, we will say, a first-run house for 30 per cent of the gross——

Mr. Wright: Yes?

Judge Bright: —now, he can go to another chap who wants the feature also but says, "I can't pay 30 per cent of the gross," can you license that same feature to the second man for $250——

Mr. Wright: Why not?

Judge Bright: —on condition that he play it 30 days after the first fellow?

Mr. Wright: If you phrase the condition that way I think it would be invalid; but, clearly, I think when you license it

to him you can specify the period when he is to have it in his theatre and control his use in that way. That is, you tell him, "I am renting this to you for a certain specific date."

Judge Hand: That is just another instance of things you say can be done; but things which equal the same thing equal each other generally.

Mr. Wright: If the Court please, I insist that they do not equal the same thing. You do have here an agreement restricting and exhibitor's conduct as an exhibitor and restricting the distributor's behavior as a distributor. The copyright owner, if he is to operate within his grant, may not make an agreement as to what he is going to do with A in terms of what he is going to do with B.

Judge Bright: Under your statement, to take a broad aspect of it, this copyright owner could not license his feature to the man who pays the high dollar and protect him against some kind of competition?

Mr. Wright: He certainly could not protect him from competition by making an agreement with him to do that. The only protection that he could ever get—well, he might get incidental protection from competition if the distributor decided independently that for his purposes he was going to license to A, and he was going to wait 10 days or 30 days before he licensed B, so he does not grant B a license to play until a specific period of time.

Now, conceivably you could justify the fact that A might be thereby protected from competition with B by saying that such an incidental restraint would be none of the copyright owner's business, but he is not in a position to say that when he makes an express agreement with A that he is going to give him this protection in dealing with B; and particularly in a system where he does not do this would be far more defensible if he were dealing with an individual copyrighted picture. But where it is done in groups of pictures from month to month, year to year, and you get a resulting structure of price and clearance restrictions which are geared to theatre status rather than to copyright ownership, it seems

to me you are just way beyond any kind of price fixing that the copyright could conceivably be thought to sanction; and when you are in that price fixing field of an interstate commodity, you are clearly involved in a per se violation of the Sherman Act.

Judge Bright: Haven't you under the guise of the Sherman Act repealed the Copyright Law?

Mr. Wright: The Supreme Court—we have not done anything.

Judge Bright: I should have said, are you trying to repeal the Copyright Law by the Sherman Act?

Mr. Wright: We are not trying to do anything, if the Court please. This descent that Mr. Davis described down this path that leads to the place with a Latin name whose spelling is doubtful, is not being led by us.

The Court, it seems to us, is clearly leading the way down that slope and is only half way there now. The district and circuit courts are following along behind, and tied to them by opinions are defendants such as these with their feet firmly set against the descent. All we are doing is to render such assistance as we can.

Judge Bright: By pushing them.

Mr. Wright: Well, we are primarily here, it seems to me, simply to aid the courts, although occasionally of course we may nudge them with the fork.

Mr. Proskauer: The ferryman over the River Styx.

Judge Bright: It seemed to me, Mr. Wright, that one statement does not seem to jibe with the other. You say in selling to A for a percentage of the take you could not impose any restriction or impose any condition that you would not sell to B for use in less than 30 days after completion of performance of A, but you could in selling to B sell at a lower price and provide that he shall not use until 30 days after your former purchaser had finished with it.

Mr. Wright: I think you would be a little safer if you expressed your period of time in terms of the actual days

on which he would play rather than to try to tie it to his competitor's play date.[10]

Judge Bright: I see.

Mr. Wright: Now, let's take a look at what this system is alleged to do for the public.

Now the clearance and run structure that you have got here does not assure anybody of seeing a picture at a particularly low admission price at any time. The general purpose and effect of the structure, as you have seen, is to try to keep the price level up all the way. The only departures that the distributors encourage is where they have something that they think is really good and where they market if individually they try to move up the price structure for that single picture. And I think I took the witness Thalhimer over the admission price in Richmond and there wasn't a single house below the price of 25 cents. And there isn't anything about the system that encourages anybody to get in at the bottom and render a low-priced service. The tendency is the other way. The low-price subsequent-run theatre gets no protection whatever. That was shown very clearly by the correspondence between Mochrie and this fellow in Macon who was following the first-run theatre on the RKO pictures and having to do it at the same admission prices.

Now the system as such is not only illegal right on its face as a system, but the kind of abuses in it that are shown in this record are in my view in themselves enough to con-

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[10]The copyright owner would still not be saved from a Sherman Act violation if it appeared from other evidence that his purpose in fixing B's play date was to restrict competition between A and B as theatre operators. If the license to B said on its face that B could not play until 30 days after A, fixed B's minimum admission price, conditioned B's run upon its maintenance, and applied those restrictions uniformly to a group of copyrights of widely varying quality, these terms would appear to be conclusive evidence that this was his purpose. See the pre-suit (1936-37) and post-decree (1943-44) printed forms of license collected in trial brief App. B. (Ex. 275-290) and compare with pre-integration (1917-1918) printed form (Ex. P-5 and P-6).

demn it. It has been used persistently for the purpose of excluding your smaller independent operators from the more profitable phases of the business.

Judge Hand: You talk about excluding. They do an enormous amount of the business and get an enormous amount of the pictures. You think there is some unfair preferential treatment and that all these people are excluded. I don't understand.

Mr. Wright: There is no exclusion in any absolute sense, in any sense of keeping people out of the business, but there doesn't have to be. Under the Sherman Act if you use illegal means to accomplish a partial exclusion that is enough. And that is all you have here. You can go into the theatre business. There is no way of keeping these people from building theatres or buying theatres and operating them. The exclusion comes in the position that you get——

Judge Hand: They are increasing all the time and they are getting pictures all the time, and they are operating them all the time.

Mr. Wright: That is right. There have been 5,000 more theatres in the last ten years, and of course there are many more independent pictures, and you can open a theatre and you can show something on the screen. But that has not affected the control and dominance of this market that these defendants have enjoyed. I think the figures in evidence clearly show that it has not.

Now why is it with an increase of that kind in the number of theatre operations, Columbia finds itself today with fewer independents to sell in those first-run situations in towns over 25,000 than it sold ten years ago? Why it is that with this increased independent distribution and production in terms of numbers they have not penetrated this market at all in terms of making any inroads on the proportion of the dollar volume that your producer-exhibitors are able to get out of it?

Judge Hand: Undoubtedly they can't combine to keep these people out. The fact that they get most of the busi-

ness—and there are piles of the business that they do not get—is conclusive of nothing.

Mr. Wright: I don't suggest that it is. I merely say that——

Judge Hand: You might just as well say about the chain stores and the country stores. Up where I was born they didn't have any chain stores at one time and now they have just about one country store left in the place. Why was it in that case? Because the chain stores came in and gave a great deal better service.

Now all these things are capable of that interpretation and you have got to prove the wrong and not that these are big fellows and they do a tremendous business and somebody else does not do as large a business, though he would like to do it.

Mr. Wright: If all we had, if the Court please, were those statistics as to size, there wouldn't be any case. Nobody says there would be, but I am pointing out that the dominance they share is a consequence of the mutual support that these people give each other by express agreement and by adherence to these established patterns of non-competitive theatre operation throughout the country, and your patterns of division of films among the affiliated operators, where they do operate in the same territory. Take the example here in New York; your RKO Circuit and your Loew Circuit. They operate in the same areas. They have all the prior runs after the first run here. Nobody gets pictures until after Loew and until after RKO. Well, there still isn't any competition for pictures between them because the Loew Circuit plays what is known as the Loew split of the major product, that is, pictures of Loew, Paramount, Columbia, and half of Universal; and the RKO Circuit plays the remainder of the eight defendant companies. And then they go to the independents. That is not just the result of size of those circuits. It is the result of express agreements made by these distributors with those circuits which gives them a blanket pric y for their theatres over the competing independent theatres.

You take the Paramount-Loew situation here in New York City. Of course, the reason that we again emphasize this theatre structure as well as the license agreements is that even without any written agreement whatsoever as to film licensing, as far as the record shows, Loew theatres played those Paramount pictures for three seasons while they were arguing over the proper division of the profits from their exhibition, and then they made a written agreement in 1945 which finally formalized the terms under which Paramount had been serving those pictures and Loew had been exhibiting them.

Now it is simply an illustration that you cannot possibly make Loew and Paramount competitors by any kind of mere licensing practice restraints that you want to impose on them as long as you permit them each to operate both as distributors and theatre operators and deal with each other as exclusive prior run outlets for the films of each other.

The question has been asked here, well, what kind of system are you going to substitute for this very tightly arranged one that now exists? I do not think that there is any obligation either on the part of the Government or this Court to devise for these defendants some other system than the one they have now got which would still leave them in control of the industry and give it a kind of competitive facade through appropriate regulatory provisions.

Judge Hand: That is technically so but it is not very helpful, and I do not think it is a good approach to the problem. You have a great big business here that is very complicated, very hard even to understand, and to say that it is nobody's obligation, who is proposing to break up the entire system, to suggest a good alternative, seems to me absurd.

Mr. Wright: If the Court please, nobody is trying to break up an entire system. All that I am suggesting to you is that the function of this Department and of the Court is not to devise systems of operation for any business. I do not know enough about it to devise a system which would meet

all or any substantial part of the objections to the present system those that have been made to me from various elements involved in it. I do not think, with all due respect, that the Court in the time that it has to study the industry, is in a position to evolve for the defendants any new system, as such, to replace an existing system. We find that we get into trouble and we lead the courts into trouble when we try to do that.

In the Hartford-Empire case, there was a clear case for dissolution of the Hartford-Empire Company. Many independents intervened and ask to have worked out some kind of decree where the Hartford-Empire Company could be maintained intact and limit the relief to licensing restrictions. So there was worked out a complex plan of royalty free licensing and it went to the Supreme Court as a substitute for dissolution. Then when it got up there, a minority of the court rewrote the decree and came out with an equally, if not more complex, plan of licensing—compulsory licensing on reasonable royalties—which is now in effect, but, interestingly enough, as to the trade association involved, ordered dissolution virtually on its own motion. And had the Government and the court confined themselves in the first instance in that case to the traditional procedure of dealing with the problem, breaking up the combination found to be illegal, instead of attempting to impose an elaborate series of restraints that let it continue to function and still do equity in the industry, we would never have gotten into the snarl that we did.

I say, of course, that we are bound to exercise the utmost diligence and effort to work out all of these problems with the minimum of fundamental readjustment in any basic economic structures that we can, but we do have the job of law enforcement. That is all we do. We are a law enforcing agency. The only instrument we have to work with is the Sherman Act as the courts interpret it, and when we come into court in a case of this kind, the relief that we most necessarily advocate has to be confined to traditional judicial methods of dealing with these problems.

When we are dealing with consent arrangements we can, to some extent, go further, but I simply want to call the Court's attention to one phase of this whole arbitration system which I think that it ought to know about. A suit was brought in St. Louis, to which we were not made a party, charging us with conspiracy with these defendants to restrain trade by consenting to the institution of this system. The same plaintiff sought to intervene in this suit. His intervention was denied. We opposed, the defendants opposed it, and he attempted to appeal.

Judge Hand: Were you a party, and the Attorney General?

Mr. Wright: We were not made parties to his St. Louis suit. He attempted to litigate the matter here. We opposed. He tried to appeal the decision.

Judge Hand: There was a defect of parties, I should think. There is no end to what the fancy of litigants may go.

Judge Bright: Didn't we get a brief here within the last two or three weeks from that party?

Mr. Wright: I would not be surprised.

Judge Bright: It was entitled in some case out in the Midwest.

Mr. Wright: St. Louis is where it is pending. The only thing I wanted to point out about that suit is this: I am naturally satisfied that there is nothing in his complaint. He is in no position to raise, in my view, the questions he seeks to review, the constitutional——

Judge Hand: He will claim you are arguing against him without a hearing.

Mr. Wright: I simply want to point out that if he had the right to raise them, the constitutional questions he is talking about are serious, that is, I have extreme doubt myself as to whether on any permanent or quasi-permanent basis this Court, quite apart from consent, even on the basis of findings of fact and conclusions of law, could establish or maintain any kind of an arbitration system which arbitrated competitive status in an industry, you are then going,

it seems to me, beyond the purposes of law enforcement and getting into a scheme of regulation which has to have legislative support, if it is going to be valid at all. And that was one reason why we proposed in our modification to use the system as a means of arbitrating complaints of discrimination, complaints that runs had been refused, or restrictive terms imposed for the purpose of protecting some exhibitor from competition rather than for some purpose permitted by the Copyright Law and the Sherman Act and penalizing such conduct with an award of money damages, which would serve as a substitute for contempt punishment.

Within that kind of system I think arbitration or some such mechanics as that provided by arbitration may be used, but I have the gravest doubt as to whether in a proceeding of this character you can give any permanent status whatsoever to proceedings which have the effect of fixing business status in an industry.

Your Honors have heard both sides of the industry here in a sense. One of them says that they have got to have a right to practice a certain kind of restrictive licensing procedure in order to balance the advantage that these other defendants have per se from the ownership of theatres without restrictive licensing or any other forms of business practice. Now I do not think that it is the function of the Court or the Department to attempt to work out, in the first instance, some kind of scheme which is going to sanction illegal restraints over in this part of the industry so that the illegal restraints in this half won't let them get out of line. I don't understand that that is the function of any of us that are involved in this in this proceeding, and I call that to the Court's attention for what it may be worth.

Before I closed, I wanted to make clear to your Honor that I too had read the book you recommended, the Age of Jackson. I had my wife buy it for me for Christmas. And as far as I could make out, the only monopoly generally thought to be illegal there in Jackson's time was the Bank of the United States, and, as the book pointed out, in attempt-

ing to secure a recharter of that monopoly from Congress, Nicholas Biddle testified before a Congressional committee that although his bank could have destroyed any of the State banks, he had not seen fit to injure any of them.

That argument did not impress the people of Jackson's day as the basis for permitting that much concentration of economic power in private hands, and I do not think that it has any more validity today than it had then—in fact, considerably less since the passage of the Sherman Act.

Judge Bright: The statute of limitations has run against that anyway.

Mr. Wright: But the moral that I gathered Mr. Schlesinger—was trying to make by his book—was that the Jacksonians had won the battle for discussion of the political future of this country in democratic terms. That is, from then on, of course people did not advocate antidemocratic systems as against a democratic one, but now, of course, and ever since, both sides, if they have any question, always use the same terminology. We always talk in terms of democracy. Whether that helps any, I don't know.

Mr. Proskauer: No, it does not.

Mr. Wright: But it is pretty clear, I think, from the arguments made in this case that you can use Sherman Act terminology and come out with any kind of result that you want to come out with as long as you do not look at the particular consequences of the situation you are dealing with too closely.

What this Court and any other court actually does, when confronted with a question of this kind, as distinguished from what it says about it, really depends, it seems to me, on how the Court feels about that much-abused term "free enterprise", and that isn't anything I can influence by any argument I make or that they can influence by what they say, but I just want to quote what Harry Warner had to say with reference to this foreign market thing, which was referred to in Judge Proskauer's argument. What he says is this, at page 1560,

"In the past our foreign business has been exceedingly profitable, but with the cessation of the war our foreign markets are being severely restricted. Country after country is adopting quota systems and state monopolies in order to promote their own motion picture production. During the war England, our chief foreign market, was unable to produce its own pictures. Hence we were able to derive a very substantial revenue from England. At one time during the war England threatened to (and did for a time) block our funds derived from exhibition in England and was only dissuaded from so doing by being convinced that the American companies could not continue to supply England with quality productions if their English revenue were shut off altogether. With the cessation of hostilities, England is launching on production on a large scale and the dangers of a quota system or restrictive measures in some other form are pressing. The more our foreign revenues decrease, the more vital it will be for us to have the profits from our theatre operations in order to maintain our present standard of production."

I hesitate to single out Mr. Warner because, from my own view, I think his company has probably made more pictures worth making than all the rest of the industry put together, but he has, very obviously——

Mr. Caskey: That is the crowning proof.

Mr. Wright: (Continuing) —a blind spot in the way he feels about this business of free enterprise. He wants to sell American pictures in a foreign market free from restrictions, where they may be sold on their merits. He does not want that kind of market, though, at home. It is absolutely necessary for him, he says, to protect his market here by the kind of elaborate organization and the practices which you have before you.

Now, I just want to point out in behalf of the English, although I am no Anglophile, that they too, of course, have

considered this problem at length. As Mr. Raftery stated, in 1926 they passed the Films Act which prohibits blind selling and block booking in England; and very recently in 1944 during the coalition government the Board of Trade appointed a committee to make a study of the film monopoly problem in England. That is one of the characteristics of this motion picture monopoly problem, that it is not confined to this country; it is universal. We correspond with people in Australia and New Zealand about it. But after discussing the similar tendencies to monopoly in England, the growth of integration there, and all the arguments that had been advanced by the proponents of integration in England, and that it was a necessary trade weapon in the foreign markets as a wedge in getting more English pictures shown over here, I think it is interesting to note what this English committee had to say about those arguments.

Mr. Caskey: What exhibit is that?

Mr. Wright: This is not an exhibit. It is a report dated 1944 entitled "Tendencies to monopoly in the cinematograph film industry".[11]

At page 31, in paragraph 111, after discussing these tendencies, the committee said:

> "Apart, however, from these general considerations of our national trade policy, there are a number of other objections to this country endeavoring to force its way into the overseas market for films by the exercise of monopoly power, which to our minds are conclusive. The first is that the primary needs of the British screen would be thereby sacrificed. Granted our assumption that a healthy, independent British industry is indispensable, then our view given without hesitation is that if monopoly is the price of securing an export trade in films, that price is too high."

[11]Report is dated July 3, 1944 and is by a three man investigating committee appointed by the Cinematograph Film Council, a division of the Board of Trade, pursuant to a request from the President of the Board dated December 6, 1943.

Now, that is from a country that has no Sherman Anti-trust Law, and has not, presumably, the anti-monopoly tradition that we have over here.

Now, of course, the whole problem of the relation of this industry to our foreign relations is one which our State Department rather than Mr. Harry Warner or the Court or the Justice Department are primarily concerned with. But I might also call your attention to the fact that the recent report of Dr. McMahon on the Postwar International Information Program of the United States which deals with motion pictures, at page 79[12] does show at least a sympathetic understanding of what we are trying to do in this case, and contrary to the view the defendants would have you take, I do not think this proceeding is regarded as any subversive threat to our foreign policy or foreign trade as it affects the motion picture industry.

Now, of course, this whole question of what is to be done in a situation like this is an extremely difficult one. The burden of the Court, which has to do something, is much greater than the burden of those of us who simply assemble and present the problem. And, of course, as to doing something, it was suggested by some cynics when the Hartford Empire case and the Crescent case came down at the same time —"Well, if you are dealing with a medium size organization, you can take it apart and give effective relief, but the minute you get up to something big, the courts shy away from it."

Now, I do not think the fact, as Mr. Davis points out, that Loew has got 60 million dollars worth of theatres means that any standard of law can possibly be applied here other than that which was applied to, let us say, Meyer Schine who has 6 million dollars worth of theatres. I do not think for an instant that it is possible to make any differentiation of that kind. If we were wrong in the Schine and Crescent cases, we are wrong here, but it seems to me the Supreme Court has said that we were right in those cases.

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[12] As published by the Department of State.

Now, the natural tendency, of course, of any court in dealing with a problem of this kind is to shy away from the complexities that result in dealing in any drastic or effective way with large business organizations; but the fact remains that where the law requires it, it has to be done.

Now, I for my part think the Court has been extremely patient in listening to me and receiving this whole mass of evidence here. I am only sorry that I personally and our staff have not been able to do a better and a more effective job than we have of lightening that tremendous burden of actually comprehending the material and making it possible to assimilate it. If we can do anything more by way of a reply brief; I would be glad to file one. I know, however, that if we file 10 pages more and say anything or say nothing, that would immediately result in 50 or 100 pages of saying the same thing, let us say, ten times as eloquently.

Now, I do not want to impose that kind of a burden on the Court unless it be helpful, but I am completely at the Court's disposal in making any kind of an analysis or survey of the evidence or reply that the Court thinks would help.

Judge Hand: No. I have an idea that these arguments that you have been giving us will be very helpful, and I should think they ought to take the place of reply briefs and further briefs by them, and so on. I propose to go over these oral arguments which will be submitted to us very carefully.

Mr. Wright: It is entirely agreeable to us.

Judge Hand: We have been going through the main briefs, and, of course, they have the details more. But these oral arguments have been very interesting and very good, and they present the large outlines, the theories that have to be dealt with and met. Don't you think that is so?

Mr. Wright: Yes, I agree, your Honor. I have no desire to file except as it might help on some particular point. Now, we have prepared these digests of the license contracts and pooling agreements we put in evidence with indices, not as a substitute for the agreements themselves but merely as a convenient means of collecting them and giving you a quick

idea of what is in them so you can determine which ones you want to examine and which ones you want to ignore.

If there is anything we can do beyond that we want to do it.

Judge Hand: Some people who attended the Nurenburg trial told me—one of the American staff—that Justice Lawrence would not receive any exhibits unless they pointed out exactly what they were relying on. He thought it shortened the process very much. But this case has been very well kept down, I think by everybody.

Mr. Proskauer: Before we adjourn, your Honor, may I as a recipient of the Croix de Guerre from the Government make a very brief observation which will not be in the nature of a reply or sur-rebuttal. I would like to close in the atmosphere of the era of good feeling rather than in the age of Jackson which was somewhat controversial; but I am not able to forget that in our progress we started with Biddle the president of the Bank of the United States and ended with Biddle who instituted this litigation. That seems to me to be not without significance.

While I don't want to make a reply, I do want to make an observation of not more than half a minute on something that really was new here and that was the observation about the power of this Court in regard to the——

Judge Hand: Will you begin that again?

Mr. Proskauer: I was going to say about the arbitration system, that is imposed on nobody. Nobody is compelled to arbitrate excepting ourselves. We are compelled by our consent. It is a privilege to the exhibitor and not an obligation on him. And therefore I think Mr. Wright's self-reproach that having been a party to instituting an un-constitutional court is wholly beside the point, and I think he should absolve himself from all doubts or fears on that point. Other than that I would like to ask the Court to oppose this new argument by the arguments made in anticipation yesterday and I ask the privilege of joining with Mr. Wright in an expression of deep appreciation to the Court for the

patience and attention which has characterized this trial. You have made our burden very much lighter and I hope we have assisted in making yours lighter, too.

Judge Hand: We think everybody has. I won't say anything about the era of good feeling and about the age of Jackson, but I think that Mr. Wright will probably argue that there was necessarily a splendid period in between in which all the banks of the United States failed.

Mr. Proskauer: I hope it is not mal apropos to call your Honor's attention to the fact that there has been an intermediate period in which most of these moving picture companies failed.

Judge Hand: Of course your client will probably be so much pleased by being put at the head of the list by the Government and being so fully advertised that they will be willing to abide any sort of suffering.

Mr. Proskauer: No, sir. We fear the Greeks bearing gifts.

Mr. Seymour: May I just add that I am sure that all counsel have never been so graciously expedited as they have been by this Court. We felt the lash but it never left a sting or a bruise.

Judge Hand: I don't know whether you have been expedited or pushed. It is all right with us—isn't that so?

Well, thank you very much.